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**STEPHEN'S COMMENTARIES  
ON THE LAWS OF ENGLAND**

# STEPHEN'S COMMENTARIES

## SEVENTEENTH EDITION

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## SEVENTEENTH EDITION

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THOROUGHLY REVISED AND MODERNISED,  
AND BROUGHT DOWN TO THE PRESENT TIME.

UNDER THE GENERAL EDITORSHIP OF

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IN FOUR VOLUMES.

VOL. III.

## OBLIGATIONS AND CIVIL PROCEDURE

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<i>First</i>	<i>Edition</i>	-	-	-	1841—1845.
<i>Second</i>	„	-	-	-	1848.
<i>Third</i>	„	-	-	-	1853.
<i>Fourth</i>	„	-	-	-	1858.
<i>Fifth</i>	„	-	-	-	1863.
<i>Sixth</i>	„	-	-	-	1868.
<i>Seventh</i>	„	-	-	-	1874.
<i>Eighth</i>	„	-	-	-	1880.
<i>Ninth</i>	„	-	-	-	1883.
<i>Tenth</i>	„	-	-	-	1886.
<i>Eleventh</i>	„	-	-	-	1890.
<i>Twelfth</i>	„	-	-	-	1895.
<i>Thirteenth</i>	„	-	-	-	1899.
<i>Fourteenth</i>	„	-	-	-	1903.
<i>Fifteenth</i>	„	-	-	-	1908.
<i>Sixteenth</i>	„	-	-	-	1914.
<i>Seventeenth</i>	„	-	-	-	1922.



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## VOLUME III.

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NEW COMMENTARIES  
ON  
THE LAWS OF ENGLAND.

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BOOK III.

LAW OF OBLIGATIONS AND CIVIL  
PROCEDURE.

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PART I.

CONTRACTS.

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GENERAL PRINCIPLES.

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CHAPTER I.

DEFINITION. OFFER AND ACCEPTANCE.  
CONSIDERATION OR SEAL.

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Section (1).—*Introductory.*

*NATURE and sources of obligations.*—An obligation, in the language of jurisprudence, is the legal tie or *vinculum juris* (as the Roman lawyers called it), which connects two definite persons, A. and B., of whom A. has a *right* that B. shall do or refrain from doing something to, for, or on behalf of, A., while B. is under a corresponding *duty* to do or refrain from doing that same thing to, for, or on behalf of, A. A.'s end of the tie we call a right (or, more strictly, a right *in personam* in contrast with the rights *in rem* which we have been considering in the preceding volume on

Property), B.'s end a duty; 'obligation' covers both the right and the duty, considered together. The root idea is the *tying*, and is also seen in the word 'ligament' and probably in 'religion.' Our main task will be to state the principles which govern the tying and the untying of this legal tie or *vinculum juris* and the machinery by which it is enforced.

The methods by which this legal bond comes into existence and connects the two parties are mainly two. (i) The first is the act of the parties themselves in agreeing together to create such an obligation between them, which in this case is called a Contract. (ii) The second is the act of the law itself, either (a) by imposing upon two parties, standing in certain mutual relationships arising independently of agreement, an obligation analogous to a Contract, which is therefore said to arise from Quasi-Contract (*quasi ex contractu* as the Roman lawyers called it), e.g., in certain cases an obligation to restore money paid in ignorance of fact; or (b) in fixing the general principles of civil (as opposed to criminal) liability for legal injury inflicted by one person upon another apart from breach of Contract and from Quasi-Contract. For instance, when A. assaults or libels or otherwise causes a legal injury to B., immediately and automatically an obligation is fastened on A. by which he comes under a duty to make compensation to B. for the legal injury done to him, and B. has a right of action to recover this compensation; in this case it is the legal injury, or Tort as it is called, which gives rise to the obligation. The nature of the right belonging to B. which A. infringes when he does him a legal injury is considered later in Part II. of this volume (Torts).

Status consists of or gives rise to certain personal rights and duties such as those existing between husband and wife or parent and child; but, according to the better opinion of writers upon jurisprudence, the term 'obligation' should not be applied to these

rights and duties; and they have already been discussed in Volume I. (pp. 415–468). There are also certain miscellaneous obligations which are the creation of Equity, for instance, the duty owed by a trustee to his beneficiaries. But these are dealt with, so far as they fall within the compass of a work of this character, in their appropriate places in these volumes, and need not detain us here.

Thus we may adopt the following classification :

- (1) Obligations arising from Contracts, including what is termed Quasi-Contract (Part I. of this Book) ;
- (2) Obligations arising from Torts (Part II. of this Book) ;

and we can now proceed to consider Contracts.

In this and the next three chapters we shall discuss the general principles governing contracts, in the method of their formation, the necessity either of a consideration to support the promise or of sealing, their form (where any special form is required), the legal capacity of the parties, the lawfulness of the subject-matter, the effects of the vitiation or impairment of the full and free *consensus* or agreement of the parties, the performance of contracts or other means of discharge, their interpretation, their enforcement and the remedies for their breach. Having done this, we shall then proceed to consider the special nature of, and the special rules governing, some of the more important of the particular kinds of contracts, and the principal circumstances giving rise to a quasi-contract.

### Section (2).—*Definition and Essentials of a Contract.*

A *contract* is an agreement between two or more persons resulting in one or more of them being legally bound to do or not to do something for or at the instance of the other or others ; or, more shortly, an



agreement giving rise to a legally recognised obligation between the parties. (We have refrained from calling it an 'enforceable' agreement, for reasons which will become apparent in the later section on Remedies for Breach.)

The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract. In its colloquial sense, the term 'agreement' would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other. An accepted invitation to dinner, for example, would be an agreement in this sense; but it would not be a contract, because it would neither be intended to create, nor would it in fact create, any legal obligation between the parties to it. Further, even an agreement which is intended to affect the legal relations of the parties does not necessarily amount to a contract in the strict sense of the term. For instance, a conveyance of land or a deed of gift of a chattel, though involving an agreement, is, properly speaking, not a contract; because its primary legal operation is to effect a transfer of property, and not to create an obligation. Similarly, the marriage ceremony implies an agreement between the parties to it; but its only direct legal result is to create the *status* of husband and wife. In cases of this kind, however, obligations are often incidentally or consequentially created, either by implication of law or otherwise; so that it is therefore sometimes difficult to draw precisely the line between contracts, strictly so-called, and other agreements which affect the rights of the parties. Marriage (partly because questions of marriage were long dealt with by other courts than the common law courts) stands definitely

apart from ordinary contracts, and is dealt with elsewhere (Vol. I., pp. 415-426). Transactions in the nature of conveyances are harder to separate from contracts ; and much that will here be said in respect of contracts is applicable, with more or less modification, to such transactions. Conveyances are, however, dealt with in Volume II.

The following are the essential elements of a valid contract in English law.

- (1) There must be, apart from exceptional cases, an offer by one party to another, accepted by that other ; which, when accepted, is called a 'promise.'
- (2) There must be an intention to affect the legal relations of the parties, in such a way as to give rise to an obligation or obligations between them.
- (3) Either there must be valuable consideration to support each promise, or else the contract must be embodied in a deed.
- (4) In some cases, for purposes of evidence or otherwise, certain common law or statutory requirements as to form or otherwise must be complied with, in order to render the contract enforceable.
- (5) The parties must have legal capacity to contract.
- (6) The subject-matter and objects of the contract must be lawful.
- (7) There must be real, full, and free agreement between the parties.

In the following sections, we propose separately to consider each of these elements in some detail, and to examine the chief rules affecting each ; but before going any further, it will be useful to explain three expressions.

A '*void contract*' is a transaction in which the attempt to create a legal obligation has failed by

reason, for instance, of unlawfulness or fundamental operative mistake; it is no contract at all. (The expression 'void contract,' though convenient and sanctioned by usage, is open to objection as involving a contradiction in terms; and 'void agreement,' or better still, 'void transaction,' is preferable.)

A '*voidable contract*' is one which may be repudiated by a party to it at his option (for instance, an infant's promise to marry), or which requires affirmation by a party in order to make it binding upon him, but which, unless so repudiated or when affirmed, is binding on the parties to it.

An '*unenforceable contract*' is one which by reason, for instance, of the lack of some special requirement, such as written evidence or of the lapse of the period of limitation (pp. 26-31), is, or has become, unenforceable by action; in other respects it is still capable of having legal effects.

### Section (3).—*Offer and Acceptance.*

*Offer.*—An offer is an expression of readiness to do or refrain from doing something, if desired. It may be made by one person to another in any manner; either by writing, words, or conduct. But it is essential, if it is to form the basis of a contract, that it should be communicated in some way to such other person; and the communication must be actual, so that an offer contained in a letter which is lost in the post is not communicated. Usually, of course, the offer is made by express words or writing; and such cases involve little difficulty. But it is equally effectual if deducible from some unequivocal act or conduct of a person. For instance, if a cabman plying for hire takes up a passenger, no word need be spoken on either side; yet there is a complete offer and acceptance implied from the conduct of the parties. This is sometimes

called a tacit or an implied contract ; but it must not be confused with those obligations called quasi-contracts, which the law implies independently of agreement.

Again, an offer may be either specific or general. It is specific if addressed to a definite person ; and he alone can accept it. So where A. sent an order for goods (*i.e.*, an offer) to B., a tradesman, but previously on the same day B. had sold his business to C., and thereupon C. purported to accept the offer by executing the order, but without giving any intimation of the change in the ownership of the business, it was held that there was no contract, and C. failed in an action against A. to recover the price of the goods (*Boulton v. Jones* (1857) 2 H. & N. 564). It is general if addressed to the world at large or at any rate to any considerable class of persons ; and any person coming within the scope of the offer may accept it. General offers are often made by advertisements in newspapers ; and Lord Bowen's remarks in a case of this class are worth noting : " It was also said [by counsel] that the " contract is made with all the world—that is, with " everybody, and that you cannot contract with " everybody. It is not a contract made with all the " world. There is the fallacy of the argument. It " is an offer made to all the world ; and why should " not an offer be made to all the world which is to " ripen into a contract with anybody who comes " forward and performs the condition ? " Another example of a general offer is found in a railway company's time-table, which was held in *Denton v. Great Northern Railway Company* (1856) 5 E. & B. 860, to amount to an offer, accepted by any person who comes to the station and tenders the fare, and so converted into a promise, that, subject to the regulations contained or incorporated in the time-table, a train will run as advertised ; and for breach of this contract the disappointed passenger recovered damages. (The



other cause of action in this case, namely the tort of deceit, is discussed later (pp. 388-394.) As we shall see later, the acceptance of this kind of offer may present certain peculiarities.

*Acceptance.*—We have seen that an offer is a conditional expression of readiness to do or not do something. Acceptance of the offer makes it unconditional; and it is then usually termed a 'promise.' Acceptance also may take place by writing, words, or conduct. For instance, in the illustration above referred to, the fact of the passenger entering a public conveyance would be a sufficient acceptance of the driver's offer to carry him, implied from his (the driver's) conduct in plying for hire. Again, if a tradesman sends goods on approval to the house of a person who retains and uses the goods, there is an implied acceptance of the goods, and a corresponding liability to pay the price specified, if any, or, if none, a reasonable price. It is very often far from easy to decide the limits of implied acceptance in connection with what may, for convenience' sake, be called 'ticket cases.' Very many contracts at the present day, such as those with railway and similar companies, are made by the delivery by one party to another of a ticket or document in a common form embodying certain terms and conditions. In such a case the question arises, whether the recipient of the ticket has assented to the terms and conditions; if he is aware of the nature of the terms and conditions stated on the ticket, or even if he knows of their existence, although he may be ignorant of their exact effect, he is, in most cases, held to be bound by them, on the ground of implied acceptance (*Parker v. G.E.R. Co.* (1876) 1 C. P. D. 618).

*Knowledge of offer necessary.*—There can be no valid acceptance of an offer which was not known to the person who claims to have accepted, at the time of his alleged acceptance. He must do the act con-



stituting acceptance with his eyes open. Sometimes it happens that a person does something, for instance, finds a dog or traces a criminal, and discovers subsequently that he has unwittingly done an act for which a reward has been offered. It is clear, in spite of a conflict of decisions, that here there are no acceptance of the offer, and no legal right to recover the reward. Further, it would seem clear on principle, that there must be present in the mind, not merely knowledge of the offer, but an intention to accept it ; though in one not very satisfactory case, where the motive for the act, *i.e.*, giving information leading to the conviction of a murderer, was to ease the conscience of the informer who believed herself to be about to die, and where the court assumed that she was aware of the offer of the reward, there was held to be a binding contract and she recovered the reward (*Williams v. Carwardine* (1833) 4 B. & Ad. 621).

*Communication of acceptance.*—As a general rule, an acceptance of an offer should be notified to the offeror ; and in such cases the contract will be complete only when the acceptance is so notified. Till then, there is no contract. Thus A. and B. had been in correspondence regarding a certain horse, and finally A. wrote to B. offering £30, adding : “ If I hear no “ more about him, I consider the horse mine at £30.” B. in his own mind intended that A. should have the horse for £30, but failed to communicate his acceptance to A. ; then the horse was inadvertently included by C., an auctioneer, in an auction sale of B’s horses, and in fact sold to D. It was held, in an unsuccessful action brought by A. against C. for the wrongful conversion of his (A’s) horse, that at the time of the sale no contract between A. and B. had been formed, and so the property in the horse at the material date remained in B. and had not been vested in A. (*Felthouse v. Bindley* (1862) 11 C. B. N. S. 869).

If the offeror prescribes a mode of communication of the acceptance, then that mode must be adopted ; if no mode is prescribed, then the communication must take a form which is reasonable in the circumstances. The offeror may dictate to the offeree a mode of acceptance ; but he cannot saddle the offeree with a contract by making him an offer coupled with the intimation that “ if I don’t hear from you within a week, I shall regard my offer as accepted.” He cannot place the offeree under the obligation of communicating a refusal.

But the doctrine that there is no contract until the acceptance has been communicated to the offeror, has two important exceptions, the first usually occurring in the case of general offers made by advertisement, the second in the case of acceptances by post. Dealing with the first of these exceptions, as notification of acceptance is required for the benefit of the person who makes the offer, the latter may dispense with notice to himself, if he thinks fit. Thus, where the offeror expressly or by implication indicates in the offer that it will be sufficient to act on the offer without communicating acceptance to himself, it will be a sufficient acceptance, if the offeree so acts without notification. This implication arises in the advertisement cases. “ If,” as Lord Bowen said in the famous *Smoke Ball* case (*Carlill v. Carbolic Smoke Ball Company* [1892] 2 Q. B. 484 and [1893] 1 Q. B. 256), which is a mine of information upon the law of contract, “ I advertise to the world that my dog is lost, and “ that anybody who brings the dog to a particular “ place will be paid some money, are all the police or “ other persons whose duty it is to find lost dogs to be “ expected to sit down and write me a note saying “ that they have accepted my proposal ? Why, of “ course, they at once look after the dog, and as soon “ as they find the dog they have performed the con-

“dition. The essence of the transaction is, that  
“the dog should be found; and it is not necessary,  
“under such circumstances, as it seems to me, that in  
“order to make the contract binding there should be  
“any notification of acceptance.”

*Acceptance by post.*—Normally the communication of an acceptance operates when the communication, *e.g.*, an oral message which I send by my servant, reaches the offeror. But the habit of making contracts by correspondence through the medium of the Post Office has given rise to a different rule for the decision of these cases. It has been stated by Lord Herschell as follows:—“Where the circumstances  
“are such that it must have been within the contem-  
“plation of the parties that, according to the ordinary  
“usages of mankind, the post might be used as a  
“means of communicating the acceptance of an offer,  
“the acceptance is complete as soon as it is posted,”  
that is, the contract is then formed. (*Henthorn v. Fraser* [1892] 2 Ch., at p. 33). Not only does posting the acceptance clinch the contract, but it does so as at the moment of posting; even though the letter of acceptance may be delayed in the post—indeed, even though it may be lost in the post and never come into the hands of the offeror. And similarly an acceptance by telegram is complete as soon as the telegram is handed in for despatch. It is clear that an offeror in circumstances to which the postal rule applies may be greatly embarrassed by its operation. After the lapse of a normal period for the receipt of a reply to his offer, he may wish, for instance, to sell to another customer the goods under offer; he does so at his peril. He may wish to revoke his offer; but unless his letter of revocation reaches the offeree before the latter has by posting his acceptance converted himself into an acceptor and clinched the contract, the revocation will be too late to operate; even though it should reach the offeree

before the letter of acceptance reaches the offeror (*Byrne v. van Tienhoven* (1880) 5 C. P. D. 344). This embarrassment could, however, have been avoided by the offeror, if he had stipulated in his offer that no contract should be deemed to be formed until the letter of acceptance actually reached his hands. It should also be noted, that delivery to a postman who is not authorised to accept letters for the post, is not equivalent to posting in the usual way, at the moment of handing the letters to the postman.

The postal rule has yet another corollary which should follow on principle, namely, that an acceptance once posted, in circumstances to which the rule is applicable, is irretrievable, and cannot be cancelled or revoked by a telegram or a messenger, or another letter reaching the offeror at the same time as, or before, the original letter of acceptance. But the English courts have not yet been called upon to decide these points. On the other hand, there seems to be no reason to doubt that a letter of acceptance, not posted but sent by the hand of the offeree's servant, can be recalled by the despatch of another servant who overtakes the former one and brings him and the letter back to his master; for in such a case the acceptance would not have been complete and communicated until it had reached the offeror, and until then the offeree would not have become an acceptor.

*Lapse and revocation of an offer.*—An offer lapses, *i.e.*, loses its virtue and becomes incapable of acceptance, (i) if not accepted within the time and in the manner specified by the offeror; or (ii) if no time or manner is specified, in a time or manner which is reasonable in the circumstances; or (iii) upon the death of either party before acceptance; or (iv) if the offeree communicates his refusal of the offer or makes a counter-offer. So if A. offers B. a horse for £100, and B. in reply offers £90, which A. declines to accept, and



B. thereupon says : “ Very well, I accept your offer at “ £100,” there is no contract ; for B.’s counter-offer ‘ killed ’ A.’s original offer (*Hyde v. Wrench* (1840) 3 Beav., 334).

An offer is revoked if, at any time before acceptance, the offeree receives from the offeror notice of revocation ; and it has been held, that even notice received by the offeree from a third party of the revocation, or of circumstances clearly negating the continued subsistence of the offer, is sufficient revocation to preclude subsequent acceptance (*Dickinson v. Dodds* (1876) 2 Ch. D. 463). But no offer can be revoked when once validly accepted ; and no revocation has any effect unless actually communicated to the offeree. The mere posting of a letter of revocation is not equivalent to revocation. It is to be observed, however, that even an express promise to keep an offer open is not binding unless such promise is contained in a valid contract, as being made either by deed or for valuable consideration. In the latter case, such contract is commonly known as ‘ an agreement for an option,’ and is a familiar incident in modern business life.

*Identity of terms.*—Further, it is important to remember, that acceptance, to be effective, must be identical with the terms of the offer, and must be absolute. Otherwise, there is no *consensus ad idem*, and therefore no contract. So if A. says to B. : “ I “ will sell you my chestnut mare for £100,” and B. replies “ I accept your chestnut mare together with “ her last foal ” (or “ if you will include her last foal ”) “ for £100,” there is no contract. Very difficult cases on this point frequently arise in connection with the sale of land, where the acceptance of an offer refers to a formal document being prepared, or to the approval of the contract by the offeree’s solicitor. It is impossible here to discuss this class of cases ; but the general test applicable is, whether the



acceptance is intended to be final, or conditional on some further event. If it is made expressly 'subject to' some further event, *e.g.*, 'the preparation of a formal contract,' it is, *primâ facie*, a conditional acceptance; and there is no binding contract. But an agreement to embody the terms agreed upon in a more formal document, is not necessarily inconsistent with there being a complete and concluded contract (Vol. II., pp. 293–294).

*Concurrent expression of intention.*—The assumption made in this section that every contract is capable of analysis into offer and acceptance, forms a convenient working rule, and holds good for the vast majority of contracts. It has, however, been pointed out, particularly by Sir Frederick Pollock in his *Principles of Contract*, that there are some contracts, *e.g.*, a lease once it is embodied in a deed, or the simultaneous entry of two competitors for a race, which cannot, except by Procrustean violence, be reduced to offer and acceptance. It is therefore desirable to bear in mind that the 'offer and acceptance' theory is a working hypothesis only, and to add to it, as an alternative method of the formation of a contract, the concurrent expression by the parties of their intention to enter into the contract.

#### Section (4).—*Intention to create Legal Relations.*

This is so obvious an essential that it requires little comment. There are very many engagements made in the ordinary course of life, which are agreements in the wide sense of the term, but are intended merely as arrangements of a social or friendly nature, and are in no way intended to bind the parties legally. For instance, as already stated, an accepted invitation to dinner could not reasonably be regarded as a contract. •And so, an extravagant offer, made in jest or not

intended to be taken seriously, would not usually be binding. It is possible that cases may occur somewhat near the border-line ; and, if so, it is a question of fact in each case, whether a legal contract was or was not intended.

Even where it is fully hoped or intended that legal relations will eventually result, care must be taken to distinguish between definite offers and mere invitations to make offers. For instance, a prospectus issued by a company purporting to 'offer shares to the public,' or an advertisement for tenders for materials to be supplied or work to be done, or an auctioneer's announcement of his intention to sell property by auction, is usually not a legal offer capable of acceptance by the applicant for shares or the maker of the lowest tender or of the highest bid respectively, but merely an invitation to the public to make legal offers in the form of applications for shares, or tenders, or bids. Again, it is necessary to distinguish between mere information, for instance, as to the price an owner of property would take for it, furnished in response to a request, and a definite offer intended (if accepted) to form a contract. But it has been held (though the decision could at the time be supported on other grounds) that the issue by a railway company of its time-table constitutes an offer to the public at large, which is accepted by any person who presents himself at a station and tenders the price of a ticket for his intended journey (pp. 7-8). Modern time-tables, however, usually contain notices severely restricting the company's liability.

#### Section (5).—*Consideration or Seal.*

For any contract to be enforceable at law, it is essential either that it should be made under seal, or that it should be made for valuable consideration.

*Contracts under seal.*—By a contract under seal is meant one which is embodied in a deed, *i.e.*, a document in writing or print upon paper or parchment, sealed and delivered by the party against whom it is sought to be enforced (see Vol. II., pp. 32–34). These are called ‘specialty’ contracts, whereas those whose validity rests upon the existence of valuable consideration are called ‘simple’ contracts.

A promise contained in a unilateral deed is binding on the party making it as soon as the deed is executed, without any communication to or acceptance by the other party; and such promise does not lapse (as a mere offer would) by the death of the covenantor before such communication or acceptance. Nor can the person who executes the deed revoke it, or prevent it from operating, by any act on his part, such as destroying it. But if, when the deed is communicated to the person in whose favour it is made, the latter repudiates it, the deed will be of no effect, just as if it had never been made.

A deed has certain other characteristic effects, of which we may mention the following: (i) *estoppel*, that is, a deed by reason of its solemn nature gives rise to “a rule of evidence which precludes a person “from denying the truth of some statement previously “made by himself” and embodied under his hand and seal in a deed; (ii) *merger*, whereby a simple contract is discharged or destroyed when an identical obligation is made between the same parties by a specialty contract. And (iii) the period of *limitation of actions*; an action to enforce a specialty contract must be brought within twenty years from the breach, an action to enforce a simple contract within six.

It follows from what has been already stated, that a promise by deed is enforceable, although it is purely voluntary and unaccompanied by any benefit to the promisor. Hence, a promise to make a gift of anything is not binding unless under seal; for instance,

it has been held that a promise, not made by deed, to subscribe to a charitable or philanthropic object, is unenforceable.

There are various special cases in which, by the Common Law or statute, a contract must be under seal. But these are irrespective of the question of consideration; and are, therefore, more appropriately dealt with hereafter (pp. 24–25).

*Valuable consideration.*—Every contract not under seal must be based upon ‘valuable consideration.’ Expressed in simple terms, this rule means that, in order that a party to the contract may be legally bound, he must have got something, or a promise of something, in return for his own promise. A well-known judicial definition is as follows: “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other”; but the following contains two other and important elements: “Valuable consideration for a promise consists in some benefit accruing to the party making it (called the promisor) or some detriment suffered by the party to whom it is made (called the promisee) *in exchange for and at the time of the promise.*” It is more correct to speak of the promise than of the contract requiring consideration. If the contract contains two promises, each must have a consideration; and it will generally be found that each is the consideration for the other.

Thus, the following have been held to be sufficient considerations to support a promise: marriage, or a promise to marry the promisor; forbearance to sue on, or compromise of, a claim made *bonâ fide* by the claimant and believed in by him, though in fact unfounded; labour or trouble undertaken; anything done at the request or invitation of the promisor and



in reliance on the promise, even though it may not apparently benefit the promisor in the least. But, of course, the most common example of valuable consideration is money or other property, or a promise to pay or transfer it.

Motive is not the same thing as consideration, and must not be confused with it. If I ask you to lend money to a friend of mine, and undertake to be responsible for its repayment, my motive is friendship; but the consideration which supports my promise or undertaking is the detriment suffered by you in parting with your money. Nor does a moral obligation to do the thing promised constitute a sufficient consideration for the promise. "Such a doctrine," said Lord Denman, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it" (*Eastwood v. Kenyon* (1846) 11 A. & E. 438).

There is another kind of consideration known as 'good consideration' consisting of kinship or relationship by marriage (but the act of marriage of itself is, as has been stated, valuable consideration), which has certain effects in branches of our legal system which have been peculiarly within the province of Equity. But this kind of consideration is not recognised in the law of contracts; and, when consideration is spoken of in regard to contracts, valuable consideration is always intended.

The following points with regard to consideration deserve particular attention :

(i) Consideration is either *executed* or *executory*. Executed consideration is any act or forbearance completely performed by the promisee in return for the promise, and contemporaneous with it; as, for instance, the transfer of the ownership of goods sold in return for the purchaser's promise to pay for them, in case of a sale of goods, or the performance of an



act for which a reward is offered. Executory consideration is a promise to act or forbear, given in return for the promise for which it forms the consideration; as, for instance, a promise to transfer the ownership of goods in return for the purchaser's promise to pay, in the case of an agreement to sell, or the promise to perform services in return for a promise to pay for them. In all cases of this latter kind, it is obvious that each promise forms an executory consideration for the promise of the other party.

(ii) Consideration need not be *adequate*. Provided it is real and legally appreciable, it is recognised by law, however slight its apparent value may be. Thus, the mere handing over of a document was held to be a sufficient consideration for a promise to pay a large sum of money; even though the document turned out to be of no value (*Haigh v. Brooks* (1840) 10 A. & E. 309). As was said by Lord Denman, C.J.: "Both (parties) being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained what that value was that he most regarded. He may have had other objects and motives; and of their weight he was the only judge." And in an action upon a contract between two subscribers to a charity, whereby A. agreed to vote for B.'s nominee at a pending election for an object of the charity if B. would vote for A.'s nominee at the next election, and A. did so vote but B. refused to do so, B.'s promise was enforced; for "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced" (*Bolton v. Madden* (1873) 2 R. 9 Q. B. 55). The sending of a letter to the financial editor of a newspaper, asking

for gratuitous advice upon investments, is a valuable consideration for an implied undertaking on the part of the proprietor that reasonable care shall be used in giving the advice ; and the proprietors of the paper were held liable for loss resulting from the editor's breach of the duty to exercise care (*De la Bere v. Parson* [1907] 1 K. B. 483). If, however, consideration is grossly inadequate, the fact may, in some cases, be strong evidence of fraud ; particularly where the surrounding circumstances are suspicious.

(iii) An act or a forbearance to which one is already bound, either by a general rule of law, or by a previous contract *with the other party*, is regarded as being of no value in the eye of the law, and is therefore no consideration for a promise. A promise of such act or forbearance is equally incapable of being a consideration for a promise. For instance, if A. owes B. £100, and B. subsequently promises to take £50 in full satisfaction of the debt, or to take £50 down and the rest by future monthly instalments, then, whether A. pays the £50, or merely promises to pay it, B.'s promise is not binding ; and he can sue A. to recover the whole debt of £100. If, however, the smaller sum is agreed to be paid at an earlier date than that originally agreed, or at a different place, the promise will be binding. So, also, if something is accepted of less value, but of a different nature from that owed, there will be sufficient consideration ; for instance, if B. in the above case agreed to accept from A. in lieu of the £100 (with or without the £50) "a horse "or a canary or a tomtit" (as JESSEL, M.R., once facetiously observed), or, it would seem, merely the promise of one of such articles, or a negotiable instrument (such as a cheque) for a smaller sum ; "the "circumstance of negotiability making it in fact a "different thing and more advantageous than the "original debt, which was not negotiable." But, of

course, if the promise to accept a smaller sum in satisfaction of a larger debt is under seal, then no question of valuable consideration arises, and the larger debt is discharged (*Foakes v. Beer* (1884) L. R. 9 App. Ca. 605).

On the other hand, it seems that the introduction of a stranger to the original contract makes a difference; and it has been held in at least three English cases, that, if A. is already bound by an existing contract with B. to do something, the doing of that act by A. at the request of C. amounts to valuable consideration sufficient to support a promise by C. to A. But the principle is not clear, and is the subject of a controversy amongst writers of text-books (*Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159).

(iv) The consideration must not be *illegal* or *immoral* or *contrary to public policy*. This rule is only part of the general rule to be discussed later (pp. 43–55) which invalidates all contracts having an unlawful object, using that term to embrace those purposes which are illegal, or immoral, or contrary to public policy. Even a contract under seal is vitiated by the existence of an unlawful consideration; and the fact that the contract is embodied in a deed does not preclude the court from enquiring into the lawfulness of the consideration (*Collins v. Blantern* (1767) 1 Sm. L. C.)

(v) The consideration must not be something already past. For instance, if A., having already sold B. a horse, afterwards warrants the horse to be sound, B. cannot sue on the warranty; because A. in fact gains no advantage or benefit in return for his promise or warranty, the sale being already concluded, and B. suffers no detriment in respect of it, whatever he may have suffered in buying an unsound horse.

There are at least three apparent exceptions to the rule that a past consideration is no consideration.

(1) Where one person does something at another's

request, and subsequently the latter promises something in consideration of the act done, this is said to be binding. But in such cases the true view seems to be, that the request itself contains an implied offer to pay for the service what it is worth ; the rendering of the service operates as an acceptance of that offer ; and the subsequent promise is merely evidence of the value of the service. The well-known case of *Lamp-leigh v. Brathwait* (1615) Hob. 105 ; 1 Smith's Leading Cases, where B. had feloniously slain a man, and L. at B.'s request put himself to a great deal of trouble and expense in endeavouring to obtain a pardon for B. from the King, after which B. promised L. to pay him £100 but later refused to pay, and L. recovered the £100 in an action against B., is probably to be explained on this ground. (It seems that A. did not obtain the pardon ; but it was only necessary for him to plead that he "laboured and did his endeavour" to do so.) (2) Where B. has voluntarily done what A. was legally bound to do, and A. subsequently, in consideration of such act, promises B. something, the promise has in some cases been held binding. But these cases (so far as they were rightly decided) have been explained as cases of acts done at the request of the promisor, which acts formed the consideration for an original implied promise to pay a reasonable remuneration. (3) A promise to pay a debt, the right of action in respect of which is barred under the Statutes of Limitation by lapse of time, will revive the right of action, if duly evidenced by writing. But in such cases it is the original, and not the fresh, promise which is actionable (see pp. 450-451).

(vi) Consideration must 'move from the promisee,' i.e., the benefit must be furnished or the detriment suffered by the person to whom the promise is made, and who seeks to enforce it. So, if A., B., and C. enter into an agreement under which A., in considera-



tion of something done or promised by B., promises to do something for C., who confers no benefit on A. and sustains no detriment at his hands, C. at any rate cannot enforce A.'s promise. (B. may be able to do so ; but it is unlikely that he will recover more than nominal damages for the breach.) This rule has recently been deliberately affirmed by the House of Lords (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. 847), and cannot be regarded as obscured by the decision in a slightly older and somewhat perplexing case in the King's Bench Division, in which the liquidator of a company was held entitled to the benefit of an agreement to which he was a party, but without furnishing any consideration, and whereby all the directors mutually agreed to forego the fees to which they were entitled (*W. Yorkshire Darracq Agency v. Coleridge* [1911] 2 K. B. 326).

#### NOTE ON AUTHORITIES.

[For more detailed treatment of the contents of this and the next three chapters the reader should refer to Anson, "*Law of Contract.*" The law on the subject will be found in a summary form in "*Digest of English Civil Law,*" pp. 85–102. Many of the cases referred to will be found in Professor Kenny's "*Cases on the Law of Contract.*"

The following are some of the chief sources and illustrations of the principles discussed in this chapter :

*Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256.

*Felthouse v. Bindley* (1862) 11 C. B. N. S. 869.

*Henthorn v. Fraser* [1892] 2 Ch. 27.

*Dickinson v. Dodds* (1876) 2 Ch. D. 463.

*Byrne v. van Tienhoven* (1880) L. R. 5 C. P. D. 344.

*Rann v. Hughes* (1778) 7 T. R. 350 (n).

*Roscorla v. Thomas* (1842) 3 Q. B. 234.

*Lampleigh v. Brathwait* (1615) Hob. 105 ; 1 *Smith's Leading Cases*.

*Foakes v. Beer* (1884) L. R. 9 App. Ca. 605.]



## CHAPTER II.

## FORM. PARTIES.

Section (6).—*Special Requirements as to Form.*

*Stamping.*—As a general rule, no contract made in writing can be put in evidence in an action, unless it is duly stamped in accordance with the revenue laws in the cases where they require it; and among the many important exemptions from the requirement of a stamp for a written contract are those the matter whereof is not of the value of five pounds, those for the hire of labourers, artificers, or menial servants, and those for the sale of goods. The want of a stamp does not, however, usually invalidate a contract; and an unstamped agreement may be put in evidence on payment of the unpaid duty, and a further sum by way of a penalty.

*Seal.*—Some contracts, quite apart from the question whether or not they are made for valuable consideration, must be made by deed, *i.e.*, under seal. By the Common Law, corporations aggregate (Vol. I., Chap. XIV.) can only bind themselves by contracting under seal, except in the following cases, *i.e.*, (1) where the contract relates to matters of trifling importance, daily occurrence, or urgent necessity; (2) where the contract is made by a trading corporation in the ordinary course of its business; or (3) by companies incorporated under the Companies (Consolidation) Act, 1908, and similar enactments; and (4) where goods have been supplied or work done at the request of

the corporation for the purposes for which the corporation exists, the corporation will be liable to pay for such goods or work, although there is no contract under seal. So, too, a corporation which has performed the whole of its part under a contract not under seal, may sue the other party. But where the requirement of a seal is imposed by statute, as it is by the Public Health Acts upon urban authorities in the case of contracts whereof the value or amount is expected to exceed £50, even complete performance will give no right of action against the corporation.

There are also a number of miscellaneous assurances (*i.e.*, conveyances, rather than contracts) required by statute to be by deed. The following are the chief instances :—transfers of shares in companies registered under the Companies Clauses Act, 1845, leases of land for more than three years or reserving a rent of less than two thirds of the full improved value, assignments and surrenders of leases, and conveyances of any greater interest in lands, by the combined effect of the Statute of Frauds and the Real Property Act, 1845. But *contracts* for the sale of shares or of land, or for the granting of a lease, do not need to be made under seal ; and, generally speaking, equitable rights, even in land, can be created and transferred by signed writing, not under seal.

*Writing.*—Simple contracts for valuable consideration are not required to be in writing by the Common Law ; but there are many cases in which writing is required by particular statutes. The following are the chief instances :—(1) bills of exchange and promissory notes, by the Bills of Exchange Act, 1882 ; (2) agreements between masters and seamen, by the Merchant Shipping Act, 1894 ; (3) contracts of marine insurance, by the Stamp Act, 1891, and the Marine Insurance Act, 1906 ; (4) special contracts of carriage limiting the liability of railway companies, by the Railway and

Canal Traffic Act, 1854 ; (5) contracts (not evidenced in other ways) for the sale of goods of the value of £10 and upwards, by the Sale of Goods Act, 1893 ; and (6) contracts within section 4 of the Statute of Frauds.

Of these cases, only the last, for present purposes, requires special comment. The others are mentioned, each in its appropriate chapter, hereafter.

Here, however, it is necessary to state in some detail the requirements of the fourth section of the Statute of Frauds. Of this remarkable enactment, described by its title as an “ Act for Prevention of Frauds and “ Perjuries,” the credit for which is variously attributed to Lord Nottingham, Sir Matthew Hale, and Sir Leoline Jenkins, it was once said by Lord Campbell : “ I shall rejoice when this statute goes. It does more “ harm than good ; it promotes fraud rather than “ prevents it, and introduces distinctions which are “ not productive of justice.” Even the short commentary upon one section of it which follows will enable the reader to form some opinion upon the fairness of this condemnation.

The fourth section provides, that no action shall be brought upon any of five specified classes of contracts, “ unless the agreement upon which such action shall “ be brought, or some memorandum or note thereof, “ shall be in writing, signed by the party to be charged “ therewith, or some other person by him lawfully “ authorised.”

The contracts in question are these :—(1) any special promise by an executor or administrator to answer damages out of his own estate ; (2) contracts of suretyship or guarantee ; (3) “ agreements in consideration of marriage ” (*e.g.*, agreements to give or settle money or property upon a marriage, not mere promises to marry) ; (4) agreements “ not to be performed within the space of one year from the making “ thereof ” ; and (5) contracts relating to land or any

interest in land, *i.e.*, agreements for the sale or letting of land, or in any way directly concerning or affecting land.

Of these, (1) is of little importance nowadays ; (2) is dealt with hereafter (Chap. XIV.) ; (3) does not call for any special comment ; and (5) has already been dealt with (see Vol. II., pp. 292–294). But (4) has been productive of a mass of litigation and a series of artificial rules which demand a few words.

(i) Where it is clear that the intention of the parties was, that the contract should be “entirely executed on “one side,” and it was in fact so executed within a year, the statute does not apply ; and there need be no “memorandum or note.” So where, in the case of a lease having fourteen years still to run, the landlord and the tenant agreed that if the landlord would spend £50 upon certain alterations (which he did within a year) the tenant would pay £5 a year by way of increased rent during the remainder of the term, it was held, ninety years ago, that the tenant’s promise, of which there was no “memorandum or note,” could be enforced (*Donellan v. Read* (1832) 3 B. & Ad. 899). “The “result is,” said Lord Moulton, “that a contract “which obviously cannot be completely performed “within twenty years must be treated as a contract to “be performed within a year, if on one side it can be ” (and is, and was intended to be) “so performed.”

(ii) Where the agreement is *for a definite period* longer than one year, but contains a term whereby it might be completely determined within one year, it is nevertheless within the statute ; and there must be a “memorandum or note ” (*Hanau v. Ehrlich* [1912] A. C. 39).

But (iii) where the agreement is *for an indefinite period*, and might possibly be completely determined within a year, it is outside the statute, and there need not be any writing (*McGregor v. McGregor* (1888) 21 Q. B. D. 424).

Very little attempt is now made by the courts to construe *de novo* the actual words of this much litigated clause ; but the above three rules approximately represent the canon of construction which now prevails.

The following points upon the “ note or memorandum ” should be observed :

(1) The statute does not say that a contract of the specified classes must be in writing. What it does say is that there must come into existence before an action is brought on the contract a “ memorandum or note thereof.” This “ memorandum or note ” need not, necessarily, consist of a single document ; but, if it consists of several documents, the documents must either be physically connected or clearly referable to and connected with each other. A letter and its envelope are regarded as one document for this purpose ; so that a letter beginning “ Dear Sir ” may be supplemented and explained by the name of the addressee on the envelope, even when the envelope has been lost, and only oral testimony regarding it is possible (*Last v. Hucklerby* (1914) 58 Sol. p. 431).

(2) The parties must be described either by name, or in some other way, sufficiently clearly to identify them.

(3) The subject-matter must be described so as to be identifiable.

(4) The consideration, except in the case of contracts of suretyship and guarantee, must be stated, or capable of reasonable inference from the memorandum.

(5) All other material terms must appear, expressly or by reasonable inference, in the memorandum ; *e.g.*, the date of commencement of a lease.

(6) The memorandum must be signed by the party against whom the agreement is sought to be enforced, or by his agent. It is immaterial whether the party who is bringing the action has signed or not, and it



will suffice that he has accepted by words or by conduct a written offer, containing all the terms of the contract and signed by “the party to be charged.”

(7) It is not necessary that the memorandum should be contemporaneous with the contract, *i.e.*, it is only evidence, not the contract itself. But it must be in existence before any action is brought to enforce the contract. And even a letter signed by “the party to be charged,” but purporting to repudiate the contract, will, if it contains the necessary particulars, form a sufficient “memorandum or note” within the statute.

(8) The “memorandum or note” may be signed by the agent of “the party to be charged”; and that agent need not be authorised in writing, or, indeed, expressly authorised at all. An auctioneer, though mainly the seller’s agent, is the agent of the purchaser for this purpose; and a solicitor by writing a letter, or counsel by signing a pleading (in the course of proceedings prior to those in which it is sought to enforce the contract), may bind his client by a sufficient “memorandum or note” of the contract; even though in signing the letter or pleading the incidental result of doing so was not present to his mind.

There are, moreover, certain exceptional cases in which a Court of Equity will hold that this fourth section of the Statute of Frauds is not operative, *e.g.*, (1) in sales by order of the Court; (2) where the defendant does not expressly plead that he relies upon the statute; (3) where the execution of a memorandum has been prevented by the defendant’s fraud; and (4) where there is a valid oral agreement followed by part performance.

The last exception requires a short explanation. The doctrine of *part performance* is, in origin, an equitable one; though it is now applicable in every branch of the Supreme Court, and also in county courts, so far as these have equitable jurisdiction. It amounts, in

effect, to this, that, where the party relying on the existence of an oral contract, and against whom the absence of the statutory “memorandum or note” is pleaded, has, at the request or, at least, with the assent, of the other, done certain acts, exclusively referable to the contract, in fulfilment of his obligations thereunder, whereby he has been prejudiced or incurred liabilities, the other party to the contract will not, even though he pleads the Statute of Frauds, be allowed to escape entirely, but, *if the contract is one of which specific performance is capable of being decreed*, he will be ordered to perform it accordingly. In order that any acts may constitute part performance in this sense, the following conditions must be satisfied : (1) the acts must be such as to be unequivocally referable to the alleged contract, *i.e.*, can only have been done on the assumption that such a contract exists ; (2) such as to render it a fraud in the defendant to take advantage of the contract not being in writing ; (3) the contract must be such as would, if in writing, be specifically enforceable by the court ; (4) there must be proper oral evidence of the contract which is let in by the acts of part performance ; and (5) the acts relied on must have been the acts of the party relying on them, in order to make the alleged oral contract enforceable (*Daniels v. Trefusis* [1914] 1 Ch. 788).

The following acts have been held to be sufficient part performance for the purposes of this doctrine, *viz.* : taking possession of land, continuance of a tenant in possession at an increased rent, expenditure of money in buildings or improvements, and delivery of title-deeds under a parol agreement for mortgage.

On the other hand, the following acts have been held to be insufficient for the purpose, *viz.* : acts ancillary or introductory to completion of the contract, payment of purchase money on a sale, marriage, and continuance in the service of an employer ; but

an act sufficient in certain circumstances might, in different circumstances, be insufficient.

The scope of the doctrine of part performance cannot be regarded as finally and positively determined. There is powerful authority for saying that it only applies to cases concerning the sale or leasing of land; but it seems safer to say that it "applies to all cases in which a court of Equity would entertain a suit for specific performance (see p. 89 and Vol. II., pp. 308–311) if the alleged contract had been in writing."

It must be remembered, moreover, that failure to comply with the requirements of the statute in the matter of writing does not render a contract *void* or even *voidable*; it merely prevents an action from being brought upon it. For any other purpose, the contract is a subsisting one, and may be proved. Thus, when a written contract is sued upon, it is open to the defendant to show that such written contract in fact forms only part of the whole transaction, the rest of which is oral.

Writing is also required by statute for certain other purposes, *e.g.*, acknowledgments of debts and liabilities barred by the Statutes of Limitations (pp. 449–451), assignments of (a) debts and legal choses in action under the Judicature Act, 1873, s. 25 (Vol. II., pp. 592–593), and (b) copyright under the Copyright Act, 1911. But none of these transactions are really contracts.

*Other requirements.*—By statute in some cases there are certain other requirements. For example, bills of sale and transfers of British ships have to be registered in a public register; disentailing deeds and assurances to charities have to be enrolled; and certain contracts with companies have to be filed with the Registrar of Joint Stock Companies. It is not, however, necessary to consider these in detail.

Section (7).—*Legal Capacity of Parties.*

The general rule is: that any person is legally capable of entering into and enforcing a contract valid by English law. But there are certain exceptional cases in which such capacity, for some reason, does not exist, or exists only subject to limitations. The chief cases are those of contracts by the following persons, *i.e.*, (1) alien enemies; (2) foreign sovereigns or governments; (3) foreign ambassadors and their suites; (4) convicted felons; (5) infants; (6) married women; (7) lunatics; (8) drunken persons; and (9) corporations. It will be desirable briefly to consider these in order.

(1) *Alien enemies*.—Contracts with alien enemies (in the territorial sense, that is, enemy subjects resident in enemy territory, and other persons, even British subjects, voluntarily resident there during war), if made before the outbreak of war, are (according to the nature of the contract) either discharged *ipso facto* by the outbreak of war, or, in rare cases, suspended and unenforceable during the war; but if made during the war, they are void *ab initio*, unless made under licence from the Crown. But enemy subjects resident in this country by express or implied permission of the Crown, during war with their State, do not lose by the outbreak of war their contractual capacity, even if interned (*Schaffenius v. Goldberg* [1916] 1 K. B. 284).

(2) *Foreign sovereigns or governments*.—Foreign sovereigns or governments can make and enforce contracts valid by English law; but contracts cannot be enforced in our courts against such of them as are recognised by the British Government as the Heads or Governments of sovereign independent States, except where they voluntarily appear and submit to the jurisdiction.



(3) *Foreign ambassadors and their suites*.—Contracts made by foreign ambassadors and *bonâ-fide* members of their suites may be enforced in English courts by them, but not against them ; with the possible exception (not clearly decided) that if an ambassador or member of his suite engages in trade, he may be sued here on a contract entered into by him. Subject to this exception, the Diplomatic Privileges Act, 1708, makes ‘null and void’ any writ or other process against such persons. But a contract made by such a person becomes enforceable against him as soon as his privileged status comes to an end, or if, with the consent of his Government, and full knowledge of his rights, he waives his immunity.

(4) *Convicted felons*.—By the Forfeiture Act, 1870, every person convicted of treason or felony and sentenced to death or penal servitude is made incapable of making any contract, until he has served his term of imprisonment or received a pardon, or unless he is lawfully at large under a licence.

(5) *Infants*.—Before stating the present position of the law, it is desirable to notice that the general rule at Common Law was, that an infant’s contracts were voidable at his option, that is, that he could, by pleading infancy, escape liability upon them. To this rule there were important exceptions ; for instance (i) the infant could bind himself by contracts for necessities and by certain other contracts which, if not actually necessary, it was advantageous that he should be able to make ; in the words of Coke upon Littleton (172 a) “an infant may bind himselfe to pay for his necessary  
“meat, drinke, apparell, necessary physicke, and such  
“other necessities, and likewise for his good teaching  
“or instruction, whereby he may profit himselfe after-  
“wards” ; and (ii) he could not in any circumstances



make himself liable upon a bill of exchange or a promissory note. The common law rule which made the generality of an infant's contracts not void, but voidable at his option, has been modified by the Infants Relief Act, 1874, which in effect enacts—(a) that all contracts by infants for money lent or to be lent, or goods supplied or to be supplied other than necessities, and all accounts stated with infants, shall be absolutely void; and (b) that no promise made after full age to pay a debt contracted during infancy, and no ratification after full age of a contract made during infancy, shall give any right of action, even though there be a new consideration for such promise or ratification. But the Act does not render void contracts which before the Act were binding on an infant and not voidable by him.

We can now summarise the present state of the law. An infant's contracts fall into three classes; they are binding, void, or voidable.

(A) *Binding contracts*.—(1) An infant is liable to pay a reasonable price for 'necessaries' sold and delivered to him. 'Necessaries' are defined by the Sale of Goods Act (s. 2) as meaning goods "suitable to the condition in life of such infant, and to his actual requirements at the time of sale and delivery." It is obvious that many things, such as medicine and reasonable food and clothing, are essentially necessities, whereas articles of mere ornament or luxury, or even things otherwise necessary but with which the infant is already well supplied, would not be 'necessaries.' But there are many cases on the border-line, which have to be decided on the particular facts; and in general it is for the judge to say whether the articles in question can belong to the category of 'necessaries,' and for the jury to say whether they were in fact necessary for the particular infant who is being sued for their price. It is immaterial what the tradesman who supplied the

goods *thought* as to the age of the person with whom he dealt, or as to his position in life or his actual requirements at the time of the sale (*Nash v. Inman* [1908] 2 K. B. 1). The definition of 'necessaries' previously quoted is only concerned with the sale of goods; but the infant's liability is not confined to the sale of goods, and he can make himself equally liable for the hire of goods or for intangible necessities, such as services rendered to him.

(2) An infant is bound by certain contracts, which, viewed as a whole, are fair and reasonable and unequivocally for his benefit, *e.g.*, a proper contract of apprenticeship or service; but, as is clear from the passage already quoted from Coke upon Littleton, this class of contracts is closely connected with the infant's maintenance and advancement in life, and does not comprise any kind of contract merely because it happens to be 'a good bargain' for the infant.

(3) Some contracts are binding on infants by statute; *e.g.*, marriage settlements, either ante-nuptial or post-nuptial, made with the approval of the Court under the Infant Settlements Act, 1855; the infant being at least twenty years of age if a male or seventeen if a female (Vol. II., p. 316).

(4) Contracts by an infant which involve proprietary rights, and out of which rights and liabilities arise from time to time, sometimes called 'continuing contracts,' become binding on him after majority, unless he expressly repudiates them within a reasonable time, *e.g.*, a marriage settlement by, or a lease of real property or an allotment of shares to, an infant (*Edwards v. Carter* [1893] A. C. 360).

(B) *Void transactions*.—This class consists of those contracts already mentioned as made void by the Infants Relief Act, 1874, and also an infant's bills of exchange and promissory notes. But a loan of money which, regarded as a contract, would be absolutely void

under that statute, is sometimes protected by the merciful application of the principle of subrogation. If I lend money to an infant which he spends on the purchase of necessities, I can claim to be placed in the shoes of, that is, subrogated to the rights of, the tradesman who supplied the necessities, as if he had supplied them on credit; and so I can obtain judgment against the infant for the repayment of my loan. But he cannot be made liable upon a bill of exchange or a promissory note, even if it is given in payment for necessities; though he may be made liable upon the consideration underlying a bill or note if it consists of the supply of necessities.

(c) *Voidable contracts*.—This class comprises the residue of those which are neither binding nor void, including for a time only those ‘continuing contracts’ (already mentioned in paragraph (4) above) which, though originally and until the lapse of a reasonable period after majority voidable, eventually become binding if not expressly repudiated. As instances of the normal type of voidable contract may be mentioned a contract made by an infant trader for the sale by him of materials in the course of his trade, or a contract to marry (but a contract of marriage (Vol. I., pp. 415–426) is a different matter). These do not require express repudiation; and infancy may be pleaded to actions upon them (*Cowern v. Nield* [1912] 2 K. B. 419).

(d) *Ratifications by adults*.—The Act of 1874 makes any attempted ratification by an adult of a contract made during infancy, whether or not there is a new consideration for the ratification, unenforceable by action; but this provision does not invalidate an independent contract entered into after attaining full age, *e.g.*, to marry, though to the same effect as one previously entered into during infancy. And the Betting and Loans (Infants) Act, 1892, makes any

promise by an adult to pay a void loan contracted during infancy “void absolutely as against all persons “whomsoever.”

An infant who falsely represents himself as being of age, and thereby induces a person to enter into a contract with him, does not thereby make himself liable upon the contract, and is not ‘estopped,’ *i.e.*, prevented, in an action upon the contract, from pleading his infancy. But where he has obtained property by fraud, he incurs an equitable obligation to restore it, upon the principle that an infant shall not take advantage of his own wrong.

It seems that money paid by an infant under a void transaction or a voidable contract, of which he has had some benefit, cannot be recovered back by him.

An infant is, at Common Law, liable in tort ; unless an action in tort would be in effect merely an indirect way of enforcing the contract (*Leslie v. Shiell* [1914] 3 K. B. 607).

(6) *Married women*.—At Common Law, with a few exceptions, a married woman could not contract at all, so completely was her legal personality merged in that of her husband. After the development, however, by Equity of the doctrine of her ‘separate estate,’ she was allowed to bind that ‘separate estate’ to a limited extent, by her contracts (Vol. I., pp. 433–434). Now, by the Married Women’s Property Acts, 1882 and 1893, her position is, that, while remaining personally liable for her ante-nuptial debts, she can, during marriage, enter into any contract, so as to bind her separate property, as if she were a *feme-sole*. Such contract binds all her separate property, whether existing at the time of the contract or acquired afterwards, as well as property to which she may become entitled when she is no longer a married woman ; except property which is subject to



a 'restraint on anticipation.' A judgment against a married woman upon a post-nuptial liability cannot, however, be enforced against her personally, but only against so much of her property as is not protected by a "restraint upon anticipation." But if she is carrying on a trade or business, whether separately from her husband or not, she may now be made bankrupt in the same manner as if she were personally liable. Her liability on contract is thus closely connected with the doctrines of 'separate estate' and 'restraint upon anticipation,' which have already been dealt with (Vol. I., pp. 433-434).

The authority of a married woman to bind her husband by contracts which she enters into as his agent, will be more appropriately dealt with later in the chapter on the Contract of Agency (pp. 92-94). But when a married woman, having at the time no separate property, contracted in fact as her husband's agent (even though the existence of the agency was unknown to the other contracting party, who regarded her throughout as a principal), it was held in *Paquin Ltd. v. Beauclerk* [1906] A. C. 148, that she did not render her future separate property liable. For the Married Woman's Property Act, 1893, which rendered liable on her contract a married woman's future separate property, *whether she had or had not any separate property at the date of the contract*, only does so when she contracts 'otherwise than as agent.'

(7) *Lunatics*.—A lunatic's contract is binding upon him ; unless it can be shown that the other contracting party was aware, at the time of the making of the contract, that he was so insane as not to be capable of understanding what he was about. And, in any case, a lunatic is liable to pay a reasonable price for 'necessaries' sold and delivered to him. Where not binding on him, a lunatic's contract is not void, but



only voidable ; it may, therefore, be affirmed by him when he recovers his sanity, and so become binding upon him. The position of a lunatic ‘so found’ is not clear. Apparently, he is unable to affect his property by contract.

(8) *Drunken persons*.—The rule as to these is practically the same as that applicable to lunatics not ‘so found.’ But it is obvious that it would in most cases be less easy for the party seeking to enforce the contract to be ignorant of the intoxication than of the insanity of the other party.

(9) *Corporations*.—A corporation aggregate (the nature of which is explained in Vol. I., pp. 365–366) has, by the Common Law, generally speaking, and so far as its nature permits, the same capacity to contract as a natural person has. And it seems that a chartered corporation has unlimited contractual capacity as regards the other contracting party, though, as regards the State (and corporations can only be created by the authority of the State express or implied), a transgression of limitations imposed in a charter may jeopardise the continued holding of the charter. On the other hand, the contractual capacity of a statutory corporation is severely limited by the operation of what is known as the doctrine of *ultra vires* ; that is, it can only bind itself by contracts made in pursuance of such objects as are directly or indirectly authorised by its statute or other document containing the objects of its incorporation. All other contracts are *ultra vires*, void, and not binding upon it, even if its members were unanimous in their desire that the contract should be made and should bind the corporation. “The question is not as to the legality of “the contract ; the question is as to the competency

“and power of the company to make the contract.” And so joint stock companies, and other companies and corporations created under some general statute such as the Companies (Consolidation) Act, 1908, or by some special statute, are strictly limited to the powers, of contracting and otherwise, conferred by their memorandum of association, or by the special statute creating them (*Ashbury Carriage Co. v. Riche* (1875) L. R. 7 H. L. 653).

This principle is not confined to corporations, but extends with equal force to every case where a society or association formed for purposes recognised and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege. Trade unions, at any rate, if registered under the Trade Union Acts, 1871 and 1876, have been held to fall within this principle; but its application to them has been largely removed as to their political activities by the Trade Union Act, 1913.

The rules governing the form of contracts by corporations, *i.e.*, when sealing is necessary and when it is not, are distinct from the question of their capacity to contract, and have already been stated (pp. 24–25).

#### Section (8).—*Parties to a Contract.*

The following rules relating to the parties to a contract, and to the limits of its operation, should be noted :

(i) *No person who is not a party to a contract can acquire rights under it.*—So if A. and B. agree that, in consideration of £5 paid by B. to A., A. will thresh C.’s corn, and A. then refuses to do so, C. cannot sue A. for breach of contract, even if C. had been a party to the contract and A.’s promise had been made to him, because the consideration (the £5) did not move from C. ; or even, indeed, if A. and B. had agreed

together that C. should have the right to sue A. for breach of contract in the event of his failure to thresh C.'s corn (*Tweddle v. Atkinson* (1861) 1 B. & S. 393).

There are, however, certain transactions discussed elsewhere, which give rise to apparent exceptions to this rule: the assignment of impersonal rights under a contract (Vol. II., p. 591), the creation of trusts (Vol. II., pp. 186–187), the devolution of rights by operation of law, *e.g.*, to personal representatives upon a death (Vol. II., pp. 628–630) or to a trustee in bankruptcy (p. 640), and agency (pp. 98–100).

(ii) *No person who is not a party to a contract can incur liabilities under it.*—It is patent that an agreement between A. and B. that C. shall thresh A.'s corn could impose no contractual liability on C. But (1) the formation of a contract between A. and B. gives each of them a right (called a right *in rem*) against, and imposes a corresponding duty upon, the whole world, not (without lawful excuse) knowingly to procure a breach of that contract and so cause loss to either of them; a violation of that duty by any person is a tort, and as such is discussed in another place (pp. 401–403). (2) A party to a contract of an impersonal nature may, as we shall see later (p. 69), perform his contract by a nominee; but he remains liable thereon, and the nominee incurs no contractual liability. (3) Agency (pp. 98–99), as in the case of the first rule discussed above, presents an apparent exception.

(iii) *A promise may be made by a number of persons jointly, or severally, or jointly and severally. A promise may be made to a number of persons jointly, or severally, but (apparently) not jointly and severally.*

If A., B., and C. jointly promise something to X., there is only one obligation; if severally, three; if jointly and severally, four.

If X. promises something to A., B., and C. jointly, there is only one obligation; if severally, three.

The varying rights and liabilities of co-promisors and co-promisees in these differing circumstances are governed by a series of highly technical rules which need not be discussed in a work of this character ; and the main justification for referring to this subject here is, that one of the commonest applications of the next rule turns upon the fact that, in the case of a promise by joint promisors to one person, or by one person to joint promisees, there is only one obligation.

(iv) *A person cannot contract with himself.*—This seems obvious. A., B., and C. (trustees) leased premises to one of them, C., who covenanted with A., B., and C. jointly to keep the premises in repair. There is only obligation ; and C. is at each end of it. It was held that the covenant was therefore void and could not be enforced (*Napier v. Williams* [1911] 1 Ch. 361).

#### NOTE ON AUTHORITIES.

[The following are some of the chief sources and illustrations of the principles discussed in this chapter :

*Lawford v. Billericay Rural District Council* [1903] 1 K. B. 772.

*Donellan v. Read* (1832) 3 B. & Ad. 899.

*Hanau v. Ehrlich* [1912] A. C. 39.

*Oliver v. Hunting* (1890) 44 Ch. D. 205.

*Nash v. Inman* [1908] 2 K. B. 1.

*Roberts v. Gray* [1913] 1 K. B. 520.

*Edwards v. Carter* [1893] A. C. 360.

*Paquin v. Beauclerk* [1906] A. C. 148.

*Ashbury Railway Carriage Co. v. Riche* (1875) L. R. 7 H. L. 653.

*Eley v. Positive Life Assurance Co.* (1876) L. R. 1 Ex. D. 88.

*Statute of Frauds* (1677), s. 4.

*Infants Relief Act*, 1874.

*Married Women's Property Acts*, 1882, s. 1, and 1893.

The law on the subject will be found in summary form in "*Digest of English Civil Law*," pp. 103-4, 153-8. Many of the cases referred to will be found in Professor Kenny's "*Cases on the Law of Contract*."

## CHAPTER III.

UNLAWFULNESS. MISTAKE. INNOCENT MISREPRESENTATION. FRAUD. DURESS. UNDUE INFLUENCE.

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Section (9).—*Unlawfulness.*

A CONTRACT which is unlawful in respect of promise, or consideration, or ultimate purpose, is void and unenforceable. We shall firstly consider briefly this rule in its general application and consequences, and then examine some of the chief kinds of unlawfulness, dividing contracts for this purpose into those which are (i) illegal, (ii) immoral, and (iii) contrary to public policy.

The mere fact that a contract, lawful in itself, might be performed in an unlawful manner, does not necessarily avoid it, unless an intention so to perform it can be proved. A bond or other security given for a debt originating in an illegal transaction, is deemed by law to be tainted with the original illegality, and is, therefore, unenforceable; as we shall see later (Chap. VII.), negotiable instruments stand on a special footing. But, where the contract is merely void, and not illegal in the sense of being prohibited, a security given in respect of it, if under seal, is enforceable. Again, money paid under an unlawful agreement, which has been executed wholly or in a material part, cannot be recovered; for the rule is: *in pari delicto, melior est conditio possidentis*. But if the agreement has not yet been carried out in any material respect, the money may be recovered back; for, by allowing



a *locus pœnitentiæ*, the law encourages persons to withdraw from their contemplated unlawfulness. And, even where the unlawful agreement has been carried out, a party who has paid money under it innocently, or in such circumstances that he cannot be regarded as *in pari delicto*, can recover it.

Where, of several distinct promises given for a lawful consideration or contained in a deed, some are illegal or immoral, and some are not, the latter, if separable from the former, will be valid. It is said, however, that if any part of the *consideration* for a promise or a group of promises is illegal or immoral, the promise or promises will be void; for it is not possible to allocate the promise or promises to any particular part of the consideration. Finally, it should be remembered, that a contract originally lawful may become discharged, owing to unlawfulness subsequently supervening as the result of either a change in the circumstances (for instance, the outbreak of a war which would make the performance of the contract a "trading with the enemy"), or a change in English statute law or in the law of a foreign country.

Contracts may be unlawful as being (1) illegal either (a) at common law or (b) by a statute (which may prohibit a contract either expressly or by implication, and the fact of a statute imposing a penalty presumptively implies a prohibition); (2) immoral, that is, contrary to sexual morality; or (3) contrary to public policy.

We will mention, briefly, the chief classes of contracts coming under these three sub-heads; but, while it is essential to know what constitutes unlawfulness, it does not matter very much into which group the offending contract is placed. It seems that, in some of its less direct consequences, unlawfulness arising from illegality or immorality may be more disabling than when it is merely due to a conflict with

public policy ; but that is an enquiry which need not be pursued here.)

### I. ILLEGAL CONTRACTS (at common law or by statute).

(1) *Contracts tending to interfere with the government of the State.*—Thus, agreements involving bribery or undue influence at elections, agreements for the sale of public offices (both at Common Law and by statute), simoniacal contracts (by statute)—that is, contracts for the presentation of any person to a vacant ecclesiastical benefice in return for reward (Vol. I., pp. 350–351)—agreements for the sale of the salaries of public officials, or of pensions for continuing or future public services, are all illegal.

Akin to the foregoing, though more usually classified as contrary to public policy, are contracts, or conditions, attached to property, which tend to interfere with the due discharge of political duties ; for instance, a provision in a will making the holding of property dependent upon the holder (a member of the House of Lords) obtaining a step in the peerage, might tempt him to use “means of unduly influencing the dispensers of royal favour,” and was held void (*Egerton v. Brownlow* (1853) 4 H. L. C. 1). But recently a bequest in a will given upon condition that the donee (a commoner) acquired a baronetcy or some superior title, was upheld, on the ground that a baronetcy could be obtained with an amount of effort which was less than the effort involved in gaining a step in the peerage, and that, when obtained, it involved no duties, legislative or otherwise.

(2) *Contracts tending to impede the administration of justice.*—Thus, agreements to pay a witness in proportion to the amount recovered at the trial, or to

indemnify a person who goes bail for a prisoner, are illegal.

(3) *Contracts for the encouragement or procuring of crimes.*—Thus, an agreement to commit a murder, or to share the proceeds of a crime, or an agreement between several persons to buy shares in a company in order to induce the public to believe that there is a *bonâ fide* market in such shares, is illegal. But an agreement between intending purchasers at an auction not to bid against one another, but to allow one party to buy and then to divide the property or the resulting profit, has been held (by the Court of Appeal with a dissentient) to be valid and enforceable, even when the property to be sold belonged to the Government.

(4) *Contracts to compound criminal prosecutions.*—Thus, an agreement to acknowledge the signature on a forged bill in consideration of the holder forbearing to prosecute the forger, is illegal. But the mere existence of a threat of criminal proceedings does not vitiate a contract, if there is no agreement to abstain from prosecuting. And the compromise of a claim for damages is valid; even though the injured party may have an alternative or additional remedy of a public nature by prosecution.

(5) *Contracts in the nature of maintenance or champerty.*—A contract whereby one person unjustifiably agrees to assist another in bringing or defending a civil action against a third person, is a contract in the nature of maintenance, or, if the assistance is to be rendered in return for a share in the proceeds of the action, is a champertous contract, and in either case is illegal (pp. 398–400). Contracts which would otherwise amount to maintenance may be justified on the ground of nearness of relationship, or of a pre-existing common and lawful interest, or of charity;

but charity, though it may be indiscreet, must not be mercenary, and so an agreement to render aid in return for a share in the proceeds of litigation cannot be supported on the ground of charitable motive.

(6) *Contracts with an enemy government* or its subjects in time of war are illegal. But there is an exception where the Crown grants a licence to trade with the enemy.

(7) *Contracts furthering offences against religion.*—This class has been narrowed by a recent decision of the House of Lords, from which it appears that the common law offence of blasphemy no longer consists, as formerly, in the matter, but in the manner of the attack upon Christianity, and that the mere enunciation of anti-Christian doctrines, without the use of profane or scurrilous language, is not a criminal offence (*Bowman v. Secular Society* [1917] A. C. 406).

## II. IMMORAL CONTRACTS,

*i.e.*, those which tend to encourage sexual immorality or to impair the obligations of marriage.

Thus, contracts made in consideration of future illicit cohabitation, are illegal. Contracts in consideration of past cohabitation are not illegal, but (unless under seal) merely void for want of consideration. And contracts in which neither the promise nor the consideration is in itself immoral, but in which the ultimate purpose (at any rate in the mind of one party and known to the other) is the furtherance of immorality, are illegal; for instance, where a landlord lets premises to be used for immoral purposes. And the Criminal Law Amendment Act, 1912 (s. 5), authorises the landlord, upon the conviction of the tenant, lessee, or occupier of premises, for knowingly permitting them to be used as a brothel, to determine

the lease or other contract under which they are held by the convicted person ; unless such lease or contract has been assigned by the latter within three months after the landlord has required him to do so, under the Act. Failure to exercise his rights under this section, after notice of the conviction, may render the landlord criminally liable for aiding and abetting a similar offence subsequently committed upon the premises.

Contracts for future separation of husband and wife are illegal. It is immaterial whether they are made before or after marriage. But an agreement to terminate differences by an *immediate* separation is valid. Similarly, if a married man promises to marry a woman, as soon as his wife shall die, the promise is void. But if a woman enters into a contract to marry a man, who is in fact married, but not to her knowledge, she has been allowed (in two cases) to recover damages for breach of promise from him. It is doubtful whether these decisions would be followed to-day (*Wilson v. Carnley* [1908] 1 K. B. 729).

### III. CONTRACTS CONTRARY TO PUBLIC POLICY.

This is a miscellaneous and constantly expanding group, of which the following are some of the more important illustrations.

(1) *Marriage-brochage contracts*, or *contracts for procuring marriages for reward*.—Thus, a promise to pay money to a man in consideration of his consent to his daughter's marriage cannot be enforced. An agreement, for reward, to introduce a person to others of the opposite sex, with a view to marriage, is a marriage-brochage contract.

(2) *Contracts in undue restraint of marriage* are contrary to public policy and void. But the restraint, in order to have this effect, must be general, and not



merely restricting marriage with a particular person or a limited class of persons.

(3) *Contracts by parents to give up the custody of their children* are void. But an agreement contained in a separation deed between the father and the mother, to give the custody to the latter, may be valid under the Custody of Infants Act, 1873, though it will not be enforced by the court if considered contrary to the welfare of the infant. An agreement by a father depriving him of the control of the religious education of his child is also void.

(4) *Contracts in undue restraint of trade* are void on grounds of public policy. The rules upon the subject were, until recent years, in some respects not altogether free from doubt; but they have now been more clearly defined by the House of Lords in the case of *Nordenfeldt v. Maxim Nordenfeldt Co.* [1894] A. C. 535. By this and subsequent cases it is established, that a covenant or other contract in restraint of trade is legal and enforceable, provided that it complies with four conditions; viz. (i) that the restraint is no wider than is reasonably necessary for the protection of the person in whose favour it is imposed, (ii) that it is also reasonable with reference to the interests of the person making the promise, and (iii) with reference to the interests of the public, and (iv) that there is valuable consideration for the promise, even when it is under seal. But the Court will not inquire into the adequacy of the consideration; and this fourth condition amounts to little (if anything) more than to saying that the contract must be reasonable.

Subject to these conditions, a restraint on trade is not now regarded as undue, and therefore void, even though it may be unlimited in point of space, or extend to the whole life of the covenantor. Each case must

accordingly be decided upon its merits ; and the Court will have regard to all the circumstances in considering whether a case fulfils the conditions above mentioned. A restraint may be partly good and partly bad ; and, in such a case, if, upon a reasonable construction of the contract, the restriction is divisible—that is, “ where “ the covenant is not really a simple covenant, but is “ in effect a combination of several distinct covenants ” —the Court will enforce that part of it which is free from objection (*Attwood v. Lamont* [1920] 3 K. B. 571).

The law does not imply any restraint against carrying on a competing trade in the case of a sale of the goodwill of a business ; though the Court will restrain the vendor in such a case from actually soliciting former customers of the firm (*Trego v. Hunt* [1896] A. C. 7). Hence arises the practice of obtaining from a vendor a covenant in restraint of his trading activities. It is also customary for an employer, in the case of superior employees, to obtain, as one of the terms of the contract of service, a covenant restraining the employee's activities upon the termination of the service. But, as there is usually, in such a contract, less freedom of negotiation than between vendor and purchaser, the Courts will guard more carefully in such a case the interests of an employee than of a vendor, and will, in general, refuse to enforce a covenant protecting an employer against the competition of his former employee *per se* (*Attwood v. Lamont*).

Combinations of workmen for the purpose of restricting the free employment of labour or the free conduct of trade are illegal at Common Law, as operating in restraint of trade. Similarly, combinations of traders or employers for purposes operating in restraint of trade are illegal. Such combinations frequently gave rise to criminal or civil liability. And, though trade unions, whether of employers or workmen, have

been legalised by the Trade Union Acts, 1871 and 1876, and large exemptions from civil and criminal liability have been given by those Acts, and by the Conspiracy and Protection of Property Act, 1875, and the Trade Disputes Act, 1906, contracts entered into by them with their members are still, in general, incapable of being directly enforced (Trade Union Act, 1871, s. 4 (1)).

#### IV. CONTRACTS VOID BY STATUTE.

*Gaming and wagering contracts.*—These have been reserved for separate treatment, to emphasise the fact that they are not made illegal by statute, but merely null and void. (‘Gaming’ and ‘wagering’ are not synonymous; but the precise distinction between them need not detain us here, the more so as the term ‘wagering’ is generally used to include them both.) A ‘wagering contract’ has been judicially defined as “one by which two persons, professing to “hold opposite views touching the issue of a future “uncertain event” (or, let us add, a past event of which neither person knows the issue), “mutually “agree that, dependent upon the determination of “that event, one shall win from the other, and that “other shall pay or hand over to him, a sum of money “or other stake; neither of the contracting parties “having any other interest in that contract than the “sum or stake he will so win or lose, there being no “other real consideration for the making of such “contract by either of the parties.”

At Common Law, wagers and bets were not unlawful, and could be enforced by action; except when they were of an indecent nature, or calculated to disturb the peace, or otherwise contrary to public policy. They are now governed by certain statutes.

By the Gaming Act, 1845, it is enacted, that “all “contracts or agreements . . . by way of gaming or

“wagering, shall be null and void ; and no suit shall  
 “be brought . . . for recovering any sum of money  
 “or valuable thing alleged to have been won upon any  
 “wager, or which shall have been deposited in the  
 “hands of any person to abide the event on which  
 “any wager shall have been made. Provided always,  
 “that this enactment shall not be deemed to apply to  
 “any subscription or contribution . . . for or towards  
 “any plate, prize, or sum of money to be awarded to  
 “the winner . . . of any lawful game, sport, pastime,  
 “or exercise.”

The Act extends to bets and wagers of every kind ; and is not confined to betting on games and pastimes, but includes speculations in ‘differences,’ and time bargains in stock and shares. And the Court will look at the real and not merely the ostensible intention of the parties to any contract ; in order to ascertain whether or not it is within the scope of the Act. It will be noticed, however, that the Act is aimed at the wager itself, and not at transactions which are collateral to it. In consequence of this, and of the further fact that the Act merely makes the wager void, and not illegal, in the strict sense, a principal can recover from his betting agent the amount of bets made by the agent upon his instructions and won ; and (until the enactment about to be mentioned) the agent could recover from his principal the amount of bets made upon his instructions and lost. But, by the Gaming Act of 1892, any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, is null and void ; and no action may be maintained to recover any such sum of money. Consequently, the present position is, that the betting



agent cannot recover losses from his principal, but can be compelled by action to account to the principal for winnings. Money knowingly lent for the purpose of paying bets already lost is not 'money paid' within the meaning of this provision, and is recoverable.

But money paid by A., at the request of B., to discharge bets lost by B. to other persons, is not recoverable by A. from B. The position of money knowingly lent in England for the purpose of making bets is not yet decided; but money lent in a foreign country where gambling at the public tables is lawful, for the purpose of such gambling, may be recovered by action in an English court. The validity, however, of a cheque given in respect of such a loan, and payable at an English bank, depends upon the provisions of English law as to such securities, which are stated below. Money deposited with a stakeholder to abide the result of a wager may be recovered on notice given to the stakeholder at any time before payment over to the winner (*Burge v. Ashley* [1900] 1 Q. B. 744).

Considerable scope for evading the provisions of the Act of 1845 has been afforded by a series of decisions in which the winner of a wager has been allowed to recover from the loser the amount won, if he can obtain from him a fresh promise to pay it, in consideration of the winner forbearing to expose him as a defaulter (*Hyams v. Stuart King* [1908] 2 K. B. 691). But it seems that, so far, this rule has not been extended to enable a betting agent to evade the Act of 1892, by obtaining from his principal a fresh promise to pay the amount of lost bets, in consideration of the agent refraining from having him posted as a defaulter.

*Securities for money lost at gaming and wagering.*—  
Certain statutes of the seventeenth and eighteenth



centuries made securities (*i.e.*, bills of exchange, promissory notes, etc.) given to secure money lost at ‘games or pastimes’ absolutely void, a rule which was productive of hardship when those securities passed into the hands of innocent third parties who gave value for them. Accordingly, the Gaming Act, 1835, s. 1, mitigated this hardship, by providing that these securities should be not void, but (what at first sounds worse but is not really) “deemed to have been made, drawn, accepted, “given, or executed for an illegal consideration.” The effect is, that a subsequent holder for value of such a security can recover upon it, unless he was aware of its objectionable origin when he gave value for it. So a cheque given in respect of a bet upon a horse-race, or a cricket or football match falls under the Act of 1835; for these are ‘games or pastimes’ (*Woolf v. Hamilton* [1898] 2 Q. B. 337). By reason of another section of the same Act (s. 2), a loser who gives a cheque in settlement of his loss, which cheque he has had to pay, can recover the amount from the winner, even though he has actually paid it to the winner or the latter’s bank (*Sutters v. Briggs* [1922] A. C. 1).

*Contracts by certain professional practitioners.*—By the Solicitors Act, 1843, costs for work done as an attorney or solicitor cannot be recovered, unless the plaintiff was the holder of a regular certificate current when the work was done (see Vol. I., pp. 619–620). The Medical Act, 1858, similarly prevents any action being brought in respect of fees for medical or surgical advice or services, unless the plaintiff is duly registered as a qualified practitioner. Similar restrictions exist with regard to apothecaries, chemists, dentists, and veterinary surgeons.

*Contracts within the ‘Tippling Acts.’*—By the Sale of Spirits Acts, 1750 and 1862, and the County Courts

Act, 1888, provisions are made restraining actions in respect of certain debts and contracts on account of liquor consumed on the premises of the seller, or supplied in less than a given quantity at one time.

There are many other cases (which do not require enumeration here) in which the legislature has intervened to make contracts void or unenforceable, either by prohibiting them or by expressly declaring them void, or, with a view to the regulation of certain professions and trades, by depriving persons not duly qualified or registered of the right to sue.

#### Section (10).—*Reality of Consensus.*

The reality of the *consensus* of the parties to an agreement may be vitiated by the following circumstances, *i.e.*, (A) mistake ; (B) misrepresentation, either innocent or amounting to fraud ; (C) duress ; and (D) undue influence. It will be necessary to consider somewhat in detail the nature of each of these circumstances, and its precise legal effect upon an agreement.

(A) *Mistake*.—The principles upon which mistake is held to vitiate a contract are somewhat difficult in their application. It is necessary in the first place to observe, that mistake must be distinguished from mere forgetfulness or error of judgment, which is not a ground for relief. Thus, for example, a man who agreed to buy a horse for £100 could obtain no relief on the ground that he had made a ‘mistake’ in offering so much for it. In the next place, mistake affecting the agreement itself must be distinguished from mistake in the expression of the terms of the agreement. In the latter case, the contract is not void, though in equity it may be liable to be rectified or cancelled ; but such relief, generally speaking, is not given unless the mistake was mutual, or, if unilateral, was induced, or knowingly taken advantage of, by the other party.

Cases of this kind usually arise where an agreement has been reduced to writing, and the writing, by clerical error or otherwise, does not properly express the common intention of the parties. True mistake must also be distinguished from cases in which innocent or fraudulent misrepresentation by the other party to the contract produces a misapprehension in the mind of the party misled, falling short, however, of complete operative mistake, which must be such as to show that there was really no contract at all.

Further, a careful distinction must be drawn between mistakes of fact and of law. Mistake of law is usually not a ground upon which a party can be relieved from a contract. *Ignorantia juris haud excusat*. So, money paid under mistake of law, or by compulsion of legal proceedings, cannot, as a rule, be recovered. There are, however, a few exceptions in which relief is given, even on this ground, *e.g.*, mistake as to matters of private *right* or *title* (for, in the maxim quoted above, “the word *jus* is used in the sense of denoting the “general law, the ordinary law of the country,” and “private right of ownership is a matter of fact”); mistake as to foreign law, which is regarded as a mistake of fact; mistake of law caused by the other party to the contract, though the limits of this exception are somewhat doubtful; and the case of money paid by mistake of law to an officer of the court, such as a receiver, trustee in bankruptcy, or official liquidator.

Coming then to mistakes of fact with reference to the agreement itself, as distinguished from the cases hitherto mentioned, the rule is: that a contract induced by such mistake in the following classes of cases is *void*:

(1) *Where the mistake is as to the very nature of the contract itself.*—For instance, if A. signs a guarantee thinking that he is merely attesting a deed or signing

some entirely different document, the guarantee is totally void (*Foster v. MacKinnon* (1869) L. R. 4 C. P. 704). It has generally been supposed that the contract would not be void if the belief of the mistaken party was attributable to his own negligence; and such cases have rarely arisen, except where the mistake was induced by the fraud of the other contractor, or of a third party. But in a recent case (*Carlisle and Cumberland Banking Co. v. Bragg* [1911] 1 K. B. 489) the Court of Appeal has held, that negligence (except perhaps where the document signed was a negotiable instrument) is immaterial, and does not 'estop' the person who signs, from pleading *non est factum*.

(2) *Where the mistake is as to the identity of the person contracted with, e.g.,* where A. agrees to sell goods to B., believing him to be C. (*Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459). Here the contract is wholly void, at any rate when the transaction is effected by an exchange of letters, so that A. and B. are not actually face to face, and the identity of B. is a material element; because there was no intention at all, on the part of one of the contractors, to deal with the other. But it has recently been held, in a case which has not escaped criticism, that if B. comes into A.'s shop and pretends to be C., and A. sells goods to B. believing him to be C., nevertheless a contract is formed between A. and B. (though voidable at A.'s option on the ground of fraud), and the property in the goods passes to B., because A. was under no mistake that he was selling goods to the person standing in his shop (*Phillips v. Brooks Ltd.* [1919] 2 K. B. 243).

(3) *Where there is a common mistake as to the identity of the subject-matter of the contract, e.g.,* where there is a contract for sale of a cargo "to arrive ex *Peerless* "from Bombay," and, there being two ships answering



that description, the buyer means one and the seller the other (*Raffles v. Wichelhaus* (1864) 2 H. & C., 906).

(4) *Where there is a common mistake as to the existence of the subject-matter of the contract, e.g.,* where A. contracts to sell to B. a cargo of corn, which, in fact, has, at the date of the sale, ceased to exist. So, sales of life-annuities and policies of life insurance have been held void in cases where, unknown to both parties, the life had ceased (*Scott v. Coulson* [1903] 2 Ch. 249).

Closely akin is the case where the parties are under a common mistake as to the existence of some legal relationship between them which lies at the root of the contract. Thus, when what purported to be a deed of separation was entered into between A. and B., who believed themselves to be married, but in fact were not, because, as was subsequently discovered, A. had (unknown to himself or B.) a wife living at the time of the ceremony of marriage with B., the Court set aside the deed, because its basis was the common mistaken belief of the parties that they were respectively entitled and subject to the rights and liabilities of husband and wife (*Law v. Harragin* (1917) 33 T. L. R. 381).

In some cases a contract which, contrary to the belief of both parties, was from the beginning impossible, has been treated as void, and money paid under it has been ordered to be repaid.

(5) *Where the mistake of the one party is as to the promise of the other party, and is known to such other party.* Thus, if A. agrees to buy from B. certain goods, desiring goods of a particular quality, and believes that B. is promising to sell him goods of that particular quality, and B. knows that A. has such a belief, and that the goods are not, in fact, of the quality in question, the contract will be void. But if A.'s mistake was



merely as to the quality of the goods and not as to B.'s promise concerning them, then B.'s passive acquiescence in A.'s self-deception would not prevent a contract from being formed. "The 'difference,' said Lord Blackburn, "is the same as that between "buying a horse believed to be sound and buying one "believed to be warranted to be sound."

On the other hand, it must be remembered that, except in the above cases, a unilateral mistake on the part of one contractor, whether it arises from negligence or ignorance or otherwise, does not entitle him to avoid the contract. So if A. buys an old edition of Shakspeare from B., believing, in reliance on his own knowledge and without any representation from B., that it is a first folio, he cannot get off his bargain, even though B. was perfectly aware that the book was not a first folio. But it seems that even in unilateral mistake, a court of equity will, in some cases, refuse to enforce the contract by a decree for specific performance, though the mistake would have been no answer to a claim for damages at Common Law. These cases are, however, frequently cases of mistake known to and taken advantage of by the other party, and therefore falling under the fifth rule, stated above.

(B) *Misrepresentations, innocent and fraudulent*, which have so much in common that we shall deal with them together, pointing out the differences in effect and nature as they occur. A misrepresentation, whether innocent or fraudulent, may be the cause of a mistake of such a kind as will, in accordance with the rules stated above, preclude a contract from being formed, or, in the language of tradition, render the contract *void*. But in certain circumstances now to be described, a misrepresentation, while not causing an operative mistake, may have the minor effect of

rendering the contract *voidable* at the option of the party misled—that is, of entitling him to rescind it—and certain other effects in addition.

*Effects of misrepresentation : (i) Rescission.*—Innocent misrepresentation by one party entitles the other party to rescind a contract, and, as incident to such rescission, to recover only what he has spent or parted with in pursuance of the contract, so as to restore him as far as possible to his *status quo* ; and this process of restoration of the party misled to the *status quo* may sometimes, *e.g.*, in the case of a contract of partnership, include the giving of an indemnity to him against liabilities incurred under the contract before rescission. But an executed contract for the sale of a chattel or chose in action, *i.e.*, a contract which has been carried out by actual conveyance or transfer, will not, usually, be rescinded on the ground of innocent misrepresentation. Where, however, the misrepresentation is fraudulent, this right of rescission exists even after the contract has been executed, provided of course that it is still possible. To take a well-known illustration, if A. fraudulently induces B. to sell him a sheep, it is too late for B. to obtain rescission of the contract when A. has killed and eaten the sheep, or sold it to C. Again, in the words of Lord Blackburn in a common law court (in the case of *Kennedy v. Panama, etc., Mail Co.* (1867) L. R. 2 Q. B. 580), “it is enough to show that there was a  
“fraudulent representation as to *any part* of that  
“which induced the party to enter into the contract  
“which he seeks to rescind ; but where there has  
“been an innocent misrepresentation or misappre-  
“hension, it does not authorise a rescission, unless it  
“is such as to show that there is a *complete difference*  
“*in substance* between what was supposed to be and  
“what was taken, so as to constitute a failure of  
“consideration” ; though it is possible that, if speaking

since the first Judicature Act, Lord Blackburn might not have put the requirements in the case of innocent misrepresentation quite so high. The right to rescind, whether the misrepresentation be innocent or fraudulent, may be lost if, before it is exercised, third parties have acquired rights under the contract in good faith and for value. And a party who has been misled is not bound to rescind. He may elect to affirm the contract, and may insist upon the misrepresentation being made good, where that is possible, and, in the case of fraud, recover damages for the loss which he has suffered.

(ii) *As a defence*.—Whether innocent or fraudulent, misrepresentation may afford to the party misled a good defence to an action brought upon the contract either for damages for breach of it or for specific performance of it.

(iii) *Damages*.—Generally speaking, innocent misrepresentation cannot be made the ground of a claim for damages; but there are at least two exceptional cases in which, apart from any right to rescission, the party misled may obtain damages, viz.: (1) upon an implied warranty of authority, where a person honestly though erroneously represents himself as being the duly authorised agent of another person, having in fact no such authority or acting in excess of his authority. (2) Where company directors or promoters honestly, but on unreasonable grounds, make untrue statements in a company prospectus. But where a misrepresentation amounts to *fraud*, the defrauded party has an action of Deceit, by which he can recover full damages for loss of bargain or other damage sustained (pp. 388–394). It is clear that a claim for damages for Deceit cannot be made against an assignee of the fraudulent party's rights under the contract; and if the defrauded party has parted with his interest under the contract, so that matters can

no longer be restored to their original position, he cannot set up the fraud of the original party as a defence to the action by the assignee.

*What constitutes misrepresentation.*—The essential elements, common to both innocent and fraudulent misrepresentation, are as follows: (1) There must be an untrue representation of *fact*. But “the state of “a man’s mind is just as much a fact as the state of “his digestion”; and a person who states that he has a certain opinion or intention, which he has not, is guilty of a misrepresentation of fact. Such a statement must, however, be carefully distinguished from a mere expression of opinion, which turns out to be unfounded; for that is not a misrepresentation of fact. The effect of a misrepresentation of law is not clear. (2) There must be a definite representation, not mere ‘puffing’ or general commendation of the subject-matter of the contract. (3) It must be in a material particular, and such as is likely to act as an inducement to the contract. (4) The other party must be actually misled by it, and induced to enter into the contract in reliance upon it, and must suffer prejudice in consequence. (5) The statement must have been made to the complaining party, or at least with the intention that he should act upon it.

In cases of *fraud*, in order to support an action for damages for Deceit, a further element is necessary, *i.e.*, the false representation must be made “(1) knowingly, “or (2) without belief in its truth, or (3) recklessly, “careless whether it be true or false.”; in other words, the party making the misstatement must do so without any honest belief in the truth of it. This was finally established by the House of Lords in the great case of *Derry v. Peek* (1889) L. R. 14 App. Ca. 337, where the common law action for damages for Deceit was rescued from contact with any theory of a supposed distinction between ‘legal’ and ‘moral’ fraud, and



it was settled, that a misrepresentation honestly believed in is not fraudulent, merely because the belief is based on unreasonable grounds. But such a statement, though it will not be fraudulent, may have important consequences, as an 'innocent misrepresentation.'

Some, but not all, misrepresentations amount to, or involve, either a breach of warranty, or a breach of condition. A *warranty* is an agreement contemporaneous with, but collateral to the main purpose of, a contract, by which, in effect, one party asserts a particular fact, and expressly or implicitly undertakes to be responsible in damages if it should turn out to be untrue. The remedy for a breach of warranty is therefore damages. A *condition* goes to the root of the contract; and one remedy for the breach of it is rescission. Whether a statement made by a contractor, at or about the time of the contract, is a mere representation, or a warranty, or a condition, must be settled by examining the facts of each particular case. Thus, in *Bannerman v. White* (1861) 10 C. B. N. S. 844, the plaintiff, a hop-grower suing for the price of hops sold by him to the defendants, had been asked by them in the course of the negotiation of the sale whether sulphur had been used in their growth, and had replied in the negative. The defendants, who had said that if sulphur had been used they would not even ask the price, thereupon agreed to buy the plaintiff's hops; and the hops were delivered to them. As a matter of fact, sulphur had been used in the treatment of five out of three hundred acres of the hops; but the plaintiff had overlooked this, and was cleared by the jury of any intent to deceive. The jury found, however, that the plaintiff's representation as to the absence of sulphur was "a part of the contract of sale"; and the Court allowed the defendants to repudiate the contract, on the ground that the plaintiff's representation was "the condition upon



“which the defendants contracted.” This case also illustrates the principles upon which the common law courts contrived, before the Judicature Act, 1873, to give effect to innocent misrepresentation, namely, by holding that the representation was a part of or a condition of the contract. Now, as we have seen, it suffices to hold that it was a material inducement to the contract.

*Non-disclosure.*—“Silence is innocent and safe “where there is no duty to speak.” When is there “a duty to speak”? The general rule is, that parties who are negotiating a contract are at arm’s length; and no such duty is laid upon them. Rare cases may be found in which there is, in the words of Earl Cairns, “such a partial and fragmentary statement of fact, “as that the withholding of that which is not stated “makes that which is stated absolutely false”; such are cases of misrepresentation, innocent or fraudulent as the case may be. But a real exception to the general rule occurs in the case of a few contracts, called contracts *uberrimæ fidei*, the common characteristic of which is, that they may be avoided on account of mere non-disclosure of a material fact. In other words, there is in these cases a positive duty, varying in scope and in degree of stringency, imposed on one, or in a few cases on each party, not merely to refrain from active misrepresentation, but also to communicate to the other every fact relevant to the contract which might materially affect the other’s judgment. The chief classes of contracts *uberrimæ fidei* are the following: (1) contracts of insurance in respect of life, fire, and maritime or other risks; (2) contracts to take shares in a company based upon a prospectus issued by the company, at all events if the non-disclosure “contains a suggestion of falsity,” or is in breach of the requirements of the Companies (Consolidation) Act, 1908; (3) contracts for the sale of property to a

company by its promoters ; (4) (possibly) contracts of partnership ; (5) contracts for compositions with creditors ; and (6) family arrangements. It is sometimes said, that ordinary contracts of guarantee are also within the rule ; but this does not seem in harmony with authority.

Some text-book writers also place contracts for the sale of land in this class ; but it is believed that there is no general duty of disclosure on the vendor, though, if the result of the suppression by him of defects is that “ the purchaser may be considered as not having “ purchased the thing which was really the subject of “ the sale,” this may be a ground for rescission, or for resisting specific performance of the contract. And the purchaser is under no obligation to tell the vendor, for instance, that there is a valuable seam of coal under the land, of which the vendor does not know, unless, of course, the purchaser stands in a fiduciary relationship to the vendor, as agent or trustee.

(c) *Duress*.—When a party is induced to enter into a contract by actual or threatened personal violence to, or imprisonment of, himself, his wife, or child, he is said to act under duress ; and the contract is voidable at his option. Threats or violence in respect of goods or other property are not sufficient to avoid a contract ; but where money is paid to release property wrongfully withheld, it may be recovered back. So also, a contract made by an agent of the party suffering the duress, in order to remove the duress from his principal, is voidable.

(D) *Undue influence* is the unconscientious use by one person of power acquired or already possessed by him, over another, to induce that other to enter into a contract. The legal effect of undue influence, when found to have been exercised, is to make the contract voidable by the party influenced, not void ; and the right of rescission is governed, generally

speaking, by the considerations previously outlined in regard to contracts voidable for misrepresentation.

The cases are of two main types : (i) Where the undue influence is expressly used, and must be expressly proved by the party alleging it ; and, as between persons of full legal capacity and of sound mind and competent understanding, and not in any fiduciary or dependent relationship to each other, undue influence does not often occur unless in effect it amounts to fraud or duress. (ii) Where the parties to a contract or other transaction are so placed, by reason either of some special relationship between them or of some inferiority of bargaining power in one of them, that by force of circumstances “dominion may be exercised “by one person over another,” it is a general principle of law that there is a presumption of undue influence ; and “the transaction cannot stand, unless the person “claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have “been, in point of fact, fair, just, and reasonable.”

The chief cases in which this presumption arises are as follows : (1) contracts for the sale of reversionary interests, or other agreements made by ‘expectant heirs’ upon the credit of their expectancy ; (2) contracts by persons at a disadvantage owing to their illiteracy or their ignorance of business, and absence of independent advice or extreme necessity ; (3) contracts whereby persons obtain a benefit from others to whom they stand in a fiduciary or semi-fiduciary relation, such as those between parents and children, trustees and beneficiaries, solicitors and clients, guardians and wards, directors or (in the case of a sale to the company) promoters of a company and the company ; (4) contracts by any person in favour of another, who, owing to some peculiar relationship, has special facilities for exercising dominion or influence over him, *e.g.*, between medical men and their patients, or persons and their spiritual, religious,

and other confidential advisers (*Allcard v. Skinner* (1887) 36 Ch. D. 145). By the Moneylenders Act, 1900, relief may now be given against a money-lending transaction which is 'harsh and unconscionable'; even though it is not such that a court of equity would have given relief in respect of it before the Act (see *post*, pp. 257–259).

These rules as to 'undue influence' apply equally to completed conveyances or transfers *inter vivos* of property, subject, of course, to the rights of innocent third parties who have acquired for value a legal interest in the property transferred, through the transfer sought to be set aside, and to the requirement that restitution of the property is still possible.

#### NOTE ON AUTHORITIES.

[The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

- Collins v. Blantern* (1767) 2 Wils. 341 ; 1 *Smith's Leading Cases*.  
*Hermann v. Charlesworth* [1905] 2 K. B. 123.  
*Barclay v. Pearson* [1893] 2 Ch. 154.  
*Egerton v. Brownlow* (1853) 4 H. L. C. 1.  
*Bowman v. Secular Society* [1917] A. C. 406.  
*Pearce v. Brooks* (1866) L. R. 1 Ex. 213.  
*Nordenfeldt v. Maxim Nordenfeldt Co.* (1894) A. C. 535.  
*Attwood v. Lamont* [1920] 3 K. B. 571.  
*Saxby v. Fulton* [1909] 2 K. B. 208.  
*Hyams v. Stuart King* [1908] 2 K. B. 696.  
*Sutters v. Briggs* [1922] A. C. 1.  
*Cooper v. Phipps* (1867) L. R. 2 H. L. 149.  
*Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459.  
*Foster v. Mackinnon* (1869) L. R. 4 C. P. 704.  
*Couturier v. Hastie* (1856) 5 H. L. C. 673.  
*Smith v. Hughes* (1871) L. R. 6 Q. B. 597.  
*Newbigging v. Adam* (1887) 34 Ch. D. 582.  
*Bannerman v. White* (1861) 10 C. B. N. S. 844.  
*Derry v. Peck* (1889) L. R. 14 App. Ca. 337.  
*Oakes v. Turquand* (1867) L. R. 2 H. L. 325.  
*Allcard v. Skinner* (1887) 36 Ch. D. 145.

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*Gaming Acts* 1835, 1845, and 1892.

*Companies (Consolidation) Act*, 1908, s. 84.

"*Digest of English Civil Law*," pp. 34–43.]

## CHAPTER IV.

DISCHARGE OF CONTRACTS AND OF RIGHTS OF ACTION.  
CONSTRUCTION. REMEDIES FOR BREACH.Section (11).—*Discharge of Contracts.*

REVERTING to our prefatory remarks in examining the nature of a contract (p. 1), we have now considered the methods by which the parties are tied together by the *vinculum juris* or legal tie, and the effect of that tie; and it remains to examine how the tie may be unloosed or discharged. The normal method is the due performance of the obligations arising under it; but that is not the only one.

We must also be careful to distinguish the discharge of the contract itself, that is, of the primary rights and duties arising under it (the subject-matter of this section), and the discharge of the secondary right of action and corresponding duty to make compensation (dealt with in the next section) which spring into existence when a breach of the contract takes place.

The chief modes in which a contract may be discharged are the following: (1) by performance; (2) by express agreement; (3) by alteration of a written contract; (4) by merger; (5) by bankruptcy; and (6) by breach of contract by the other party in certain cases.

(1) *Performance*.—A contract must, of course, be performed strictly in accordance with its terms; and, if thus completely performed, it is obvious that it is



discharged as regards the liability of the party who has performed his duty under it. Performance must be completed at or within the time specified, or, if none be specified, then within a reasonable time. As regards place, performance must be at the agreed place, if any; and if none, then the party liable is bound to find the party entitled, being in the jurisdiction, and offer him payment or performance.

*Vicarious performance.*—In the case of a duty of performance which involves no personal element, so that it does not matter to the other party who does the promised act, so long as it is done in accordance with the contract, the party liable may do it by a servant or agent or other nominee. But this kind of performance (sometimes called ‘vicarious performance’) must not be regarded as an assignment of liability; no party can assign his contractual *liabilities* (though, as we have already seen (Vol. II., pp. 590–593), certain contractual *rights* can be assigned), and it is the party originally liable who remains entitled to sue, and liable to be sued, upon the contract which he has vicariously performed.

*Tender.*—Incidentally, the subject of tender should be noted. Frequently, performance requires the presence or concurrence of both parties, and cannot be completed by the party liable alone. Thus, the payment of money or the delivery of goods needs one party to pay or tender, the other to accept, the money or goods. In such cases tender is an attempted payment or performance by the debtor or party liable, and is equivalent (if refused) to performance, and, except in the case of a tender of money, discharges the liability. A tender of money does not of itself discharge the debt; but if the debtor is sued and pleads the tender, and that he at all times continued ready and willing to pay, and brings the money into court, he becomes entitled to his costs, if the plaintiff

recovers no more than what was tendered. The tender must comply with all the conditions of actual performance as regards time, place, and manner; and it must be unconditional. In the case of a tender of money, current coin of the realm or other legal tender must be actually produced, unless the creditor expressly or by implication dispenses with the production.

*Impossibility of performance.*—As we have already seen (p. 58), where a contract is impossible from the beginning, it is frequently regarded as void on the ground of mistake; for instance, in the case of a contract for the sale of a cargo which at the date of the contract has ceased to exist. But we are here concerned with impossibility which arises after the formation of the contract but before its breach, that is, supervening impossibility. The general rule is, that supervening impossibility does not excuse performance; but there are some important exceptions to this rule. (It is believed to be more correct to speak of the supervening impossibility in these cases as excusing performance than as discharging the contract.) They are as follows:—

(i) where performance becomes impossible by reason of a change in English statute law or (according to a decision of the Court of Appeal now under appeal) in the law of a foreign country, or by reason of a change of circumstances making performance unlawful which was originally lawful (*e.g.*, the outbreak of a war, which would make performance a “trading with the enemy” (*Ertel Bieber & Co. v. Rio Tinto* [1918] A. C. 260);

(ii) where performance of a contract for personal services or for some other personal act, *e.g.*, to marry, is prevented by the personal incapacity of the party, owing to death, illness, or otherwise, *e.g.*, by the death of an author, or by laryngitis in an actor or sciatica in a housemaid (*Robinson v. Davison* (1871) L. R. 6 Exch. 269);

(iii) where performance of the contract is dependent

on the continued existence of a specific thing, which is accidentally destroyed. So, when the Old Surrey Music Hall was let to the plaintiff for a series of concerts on certain specified days, and was accidentally destroyed by fire before the specified days, he was unable to recover damages for breach from the defendant proprietor (*Taylor v. Caldwell* (1863) 3 B. & S. 826) ;

(iv) (by a natural development of (iii)) where the performance of a contract is dependent on the continuance of a specific state of things or the happening of a specific and contemplated event. For instance, performance was held to be excused of a number of contracts for the letting of seats to view the coronation procession of King Edward VII., by its postponement on account of his illness (*Krell v. Henry* [1903] 2 K. B. 740) ; and, as the result of the recent war and its many unexpected consequences, performance of certain contracts regarded as based upon the continuance of peace and its attendant circumstances was excused on the grounds, partly of this rule, and partly of a similar doctrine of “frustration of the adventure” which has been developed in certain kinds of commercial contracts ; and,

(v) as we shall see later (p. 74), impossibility caused by the act of one of the parties to the contract is a species of breach of contract which will usually have the effect of discharging performance by the other party.

Generally speaking, however, and subject to these exceptions, the old rule remains, that if a party has not been careful to provide in the contract that performance by him will be excused if it should become impossible, he will be liable for damages for breach of contract if he is unable to perform it. When supervening impossibility does operate as a valid excuse for failure to perform, it does not affect rights which have already accrued to either party under the contract. So, money due before the impossibility arises, if not

paid, can be sued for, and, if already paid, cannot be recovered back (*Chandler v. Webster* [1904] 1 K. B. 493).

(2) *Express agreement*.—If, before any breach, both parties mutually agree to put an end to a contract which has not yet been completely performed on either side, the contract is effectually discharged. If, however, it has been completely performed by one party, the other can only be discharged by agreement if the promise to discharge him is either under seal or made for some express consideration; because otherwise the promise to discharge him would have no valuable consideration to support it. Failure to perform for a considerable lapse of time may raise an implication of an agreement to abandon a contract remaining executory on both sides.

Further, a contract may by agreement be discharged by means of a substituted contract, which expressly or by implication supersedes it. This is sometimes called *novation*, and may arise either by a new agreement between the same parties varying the old terms, or by an agreement by which a new party is substituted for an original one, as often happens on a change in a partnership.

(3) *Alteration of written contract*.—An intentional alteration of a contract in writing or under seal, in a material respect, by one party without the consent of the other, as a general rule prevents the former from enforcing the contract at all against the latter. The alteration must be material, and must not be merely accidental or by mistake. Alterations in bills of exchange and promissory notes are governed by the Bills of Exchange Act, 1882 (p. 144).

(4) *Merger*.—This occurs where, for instance, the parties to a simple contract subsequently enter into a contract under seal embodying the same terms, where-



upon the former is merged in the later contract of a higher nature in legal operation. In order that merger may take place, the two contracts must, however, be substantially identical and co-extensive ; and the parties must be the same.

(5) *Bankruptcy*.—After a receiving order is made against a debtor, no creditor having any provable debt has any remedy against the property or person of the debtor, or may commence against him any action or other legal proceeding, unless with the leave of the Court ; and in lieu thereof a creditor acquires the right of proving in the bankruptcy against the debtor's estate. But a secured creditor may realise or otherwise deal with his security. The general effect, however, of bankruptcy is not to discharge the bankrupt's contracts, but to vest them in his trustee for the benefit of the creditors ; and the trustee may (with certain exceptions) either perform them so far as they are still unperformed, or, if they are likely to be unprofitable to the bankrupt's estate, he may disclaim them, leaving the other party to prove in the bankruptcy for any loss thereby caused to him. But when a bankrupt has obtained an order of discharge, it releases him from all debts provable in the bankruptcy, except debts on recognizance, debts chargeable at the suit of the Crown or the public revenue or on bail bonds, or debts or liabilities incurred by means of any fraud or fraudulent breach of trust, and a few others. This subject is, however, more fully dealt with in the later chapter on Bankruptcy (p. 656).

(6) *Breach of the contract*.—A breach of contract by one party always gives to the other party a right of action for damages, but does not necessarily discharge the other from performance of his part of the contract. It only has this second and more serious effect (and



then only at the latter's option) when the performance of the term broken can be regarded as a condition precedent to performance by the other party. Breach of such a term will entitle the other party at his option to say: "Very well, you've broken your promise; "my promise is reciprocal to or dependent upon "yours; I regard myself as discharged."

A breach of contract may occur in several different ways, of which the following are the principal: (i) when one party actually fails to perform his promise, *e.g.*, a vendor of goods fails without just cause to deliver them; (ii) when one party completely disables himself from performing his promise, *e.g.*, A. promises to marry B. and straightway marries C.; and (iii) when one party expressly and unequivocally renounces or repudiates the contract, and makes clear his intention not to perform it, *e.g.*, A. engages B. as a clerk from the 1st May next, and, during April, tells B. that, owing to trade depression, he will not need his services. When the second and third of these kinds of breach occur, as they often do, before the agreed day for performance, they are sometimes called 'breaches by anticipation'; and they have the effect of enabling the other party to sue at once for damages, without waiting until the agreed day has passed.

The effect of that kind of breach of contract which, as we have seen, discharges the other party from performance of his part, is well illustrated by the wrongful dismissal of an employee. For example, if A., having engaged B. as a manager for two years on a written agreement, without lawful excuse dismisses him before that period has expired, he thereby not merely gives B. an action for damages for wrongful dismissal, but also releases him from any covenant restraining him from competition with A. But a partial failure to perform, for instance, default in the delivery of one of several instalments of goods, does

not entitle the other party to treat the contract as discharged ; unless the breach amounts to a repudiation, or virtually deprives him of what he hoped to get by the contract. And mere delay in performance after the time stipulated is not a ground of discharge, unless “time is of the essence of the contract.” Under the Judicature Act, 1873, this equitable rule, that time is *primâ facie* non-essential, is extended to all Divisions of the High Court ; but the rule is not applicable where the parties have expressly agreed that time shall be of the essence of the contract, or where such an intention may be inferred from its nature. Thus, it has been held that the equitable rule does not in general apply to commercial contracts ; but the Sale of Goods Act, 1893, provides that stipulations as to the time of payment are not of the essence of the contract, unless a different intention appears from the terms of the contract. It need hardly be said that delay in the performance of a contract entitles the other party to damages for any loss which he may have suffered by such delay ; but, where the performance delayed consists merely in the payment of a fixed sum of money, damages will usually be restricted to interest on the sum due at the legal rate. And the party entitled to performance has a right, on giving reasonable notice, to fix a day after which time will become ‘of the essence.’

*Conditions subsequent.*—We have spoken earlier of the effect of the failure by one party, A., to perform a term when that performance is a condition precedent to the performance of the other party, B. A.’s performance is then the condition precedent on the happening of which B.’s liability to perform arises. We have now to explain, very briefly, a condition subsequent. A contract may contain a term, express or implied, which provides that, upon the happening of a certain event, the liability of one or both parties to

performance, or further performance, shall cease. Such a term is usually called a condition subsequent. For instance, a contract for the sale and delivery of 100 tons of coal a year for five years may contain a term to the effect that, in the event of the outbreak of a war in which the British Empire is engaged, the contract shall *ipso facto* come to an end, and be discharged as to all deliveries of coal not already due. A variant of this would be a term enabling either party, upon the outbreak of war, by written notice to determine the contract.

Section (12).—*Discharge of Rights of Action.*

Every breach of contract gives rise, as we have seen (p. 73), to a right of action. There are numerous ways in which that right of action may be discharged, of which we shall now mention very briefly the most important.

(1) By a *payment* in money or in kind which is accepted in satisfaction by the party entitled to sue. But the payment of £50 in current coin of the realm or its equivalent, though accepted in full satisfaction of a debt of £200, does not discharge the whole debt, and prevent the creditor from suing for the remaining £150 ; it would, however, have that effect, as we have already seen (p. 20), if the £50 were paid by a cheque or were accompanied by “a horse or a canary or a “tomtit,” or any other article, however absurdly trifling in value.

(2) By a *release under seal* given by the party entitled to sue. Rights under bills of exchange and promissory notes may be renounced either by unsealed writing or by delivering up the bill or note to the party liable to be sued thereon.

(3) By *accord and satisfaction*, which is really nothing more than (i) an agreement by the party entitled to sue to accept in satisfaction of his right of action some

offer by the other party (that is the 'accord'), followed by (ii) the performance of that offer (that is the 'satisfaction'). But, to amount to a discharge this offer must actually be performed, and not merely promised; though in certain cases, where such was the intention of the parties, the offer of a promise, when accepted as a satisfaction, has been held to discharge the right of action though unperformed. That means, in effect, that this new contract is made in satisfaction of the right of action upon a breach of the old contract. But, for the reason above stated (p. 76), the 'accord' must not be a mere part performance of the original liability.

(4) By *merger in a judgment* recovered upon the right of action, of which it is then said: *transit in rem judicatam*. And the judgment in turn gives rise to certain rights of execution.

(5) By *bankruptcy*, as we have already seen (p. 73), of the party liable.

(6) By the effect of the *Statutes of Limitation*, which, generally speaking, bar actions upon simple contracts if not begun within six years after the right of action accrued, and actions upon contracts under seal within twenty years from the same point of time, except that actions to recover money charged on land or rent are barred at the end of twelve years, or, where it is payable under a simple contract, at the end of six years. Time does not begin to run against a party entitled to sue if he is at the time of the accrual of his right an infant or insane, until his infancy or insanity ceases, nor, if the party liable to be sued is absent beyond the seas, until his return; but, once the time has begun to run, it is not suspended by the occurrence of any of these disabilities.

A written acknowledgment of the claim by the party liable (which in the case of a simple contract must either be such as to imply a promise to pay or must itself be a promise to pay) will cause the period of



limitation to recommence and run afresh. It should also be noted that the statutes, so far as they affect contracts, only bar the remedy, and do not, as a general rule, extinguish the right; and, therefore, the right may sometimes be enforced indirectly, *e.g.*, by the realisation of a lien securing a debt, or by an executor-creditor exercising his right of retainer, or by a creditor appropriating to a statute-barred debt an unappropriated payment made by his debtor even though the statutory bar has taken effect. The operation of the various statutes of limitation is a difficult matter, and is described at greater length in a later chapter (XXV.).

(7) Probably, in the case of a breach of promise of marriage, by the *death of either party*. We have already seen (p. 70) that the death of either party to a contract containing mutual promises to marry will, when occurring before breach, excuse performance by him or by her. But, normally, once a breach of a contract has occurred, and a right of action has accrued and become vested in one of the parties, neither his death nor that of the other party will prevent the commencement or continuance of an action by or against the personal representatives of the deceased. The action does not ‘abate.’ But a breach of a promise of marriage being an injury of a peculiarly personal nature, it is clear from a group of decided cases that the death of either party discharges the right of action, with the possible exception of such part of the claim as may consist of ‘special damage,’ that is, actual temporal loss or expenditure and not merely general personal sentimental damage.

### Section (13).—*Construction of Contracts in Writing.*

Questions frequently arise as to the exact meaning of the words of a written contract. It is for the Court to interpret such words in each particular case; but



certain general rules of construction have gradually been established, though it is not easy to assign each to its proper sphere of operation and to say when one must give way to the other.

The leading rule of construction is: "that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further." But regard must be had to the whole agreement; and particular expressions must be construed in the light of their context. The primary object of the Court is to ascertain what is the true intention of the parties. But if the words used by the parties are clear and unambiguous, the Court will not go outside them, notwithstanding that it may be alleged that they do not represent the true intention of the parties; except, of course, in cases where the parties may be on proper grounds entitled to rectification of the contract (pp. 55-56).

Another rule is: that general words must be construed in application to the particular purpose for which they are used. Hence, general words following an enumeration of specific things are usually construed as restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated.

Again, the construction must as far as possible be favourable, *i.e.*, such as to support the validity of the contract; on the principle: *ut res magis valeat quam pereat*. On somewhat the same principle, the construction must be reasonable, and not necessarily in all cases literal; and the Court sometimes assumes a very considerable latitude in implying and reading into the contract terms which it is assumed the parties must have had in mind.

Again, there is, it is said, a rule, that an ambiguity of expression must be construed against the party who introduced it into the contract, rather than against the other party, according to the old maxim: *verba fortius accipiuntur contra proferentem*.

*Parol evidence*.—In general, the Court will not admit parol evidence (that is, the oral testimony of the parties to the contract, or of other witnesses) either to contradict, or modify, or add to, or subtract from, a written contract. But this rule has a number of exceptions, of which the following are the most important:

(i) *To explain a latent ambiguity*.—Where the terms are ambiguous, such ambiguity is either ‘patent’ or ‘latent.’ A patent ambiguity is one apparent on the face of a written document, as in the case of a bill of exchange, the amount of which is stated in words as ‘two hundred pounds,’ but in figures as ‘£245.’ In such cases, the Court will not receive extrinsic evidence to explain the intention of the parties. A latent ambiguity occurs where some doubt arises, not from the words themselves, but from their application to the parties or the subject-matter; *e.g.*, where two persons have the same name, or where a purchaser has agreed to buy wool which he described simply as ‘your wool.’ In this class of case, parol evidence is admissible to show the intention of the parties.

(ii) *To incorporate trade usage or local custom* which is not contradictory to, or inconsistent with, the terms of the written contract, *e.g.*, a custom in a Lincolnshire parish to the effect that an agricultural tenant whose term expires on the 1st day of May, is entitled, after the expiration of his term, to enter and “reap, cut, “and carry away, when ripe and fit to be reaped and “taken away, his waygoing crop, that is to say, all “the corn growing” on the demised land at the expiration of the term, the lease being silent on the

point ; or a custom in a particular district to the effect that ‘ 1000 rabbits ’ means 1200 rabbits. In such cases, the presumption, if the contract is not inconsistent with the usages of the trade or locality, is that “ the parties did not mean to express in writing the “ whole of the contract by which they intended to be “ bound, but to contract with reference to those known “ usages.” And closely akin to such cases is the admissibility of parol evidence to explain the meaning of technical or trade terms used in a written contract, *e.g.*, ‘ running days ’ or ‘ a full and complete cargo ’ in a charter-party.

(iii) *To prove a collateral oral agreement* not contradictory of the written contract, *e.g.*, an oral warranty given by a landlord to his tenant, in consideration of his executing and handing over the counterpart of the lease, to the effect that the drains were in order.

(iv) *To prove a defect in the contract*, *e.g.*, infancy, fraud, failure of some condition precedent to its operation, etc., or to prove that it has been totally rescinded by subsequent agreement of the parties.

### Section (14).—*Remedies for Breach of Contract.*

(A) *Action for damages.*—This is the ordinary common law remedy. The principle upon which it is based is : that if one party breaks a contract, he ought to make pecuniary compensation to the other party to such an extent that the latter may, “ so far “ as money can do it, be placed in the same situation “ as if the contract had been performed.” If the compensation is already assessed and fixed in the contract, the damages are said to be *liquidated* ; and, assuming that assessment to be a genuine attempt to pre-estimate the damages, the sum fixed is recoverable. (The important distinction between a penalty and liquidated damages is discussed later in this section.) But if the

compensation is not so assessed in the contract, then the damages are said to be *unliquidated*; and we must apply some measure by which they can be assessed or ascertained, *i.e.*, liquidated.

The measure of damages is, in general, the value of the performance to the plaintiff, and not what it would have cost the defendant to perform the contract; and the presumption, in all cases, is against the wrongdoer. "Every reasonable presumption may be made as to the benefit which the other party might have obtained by the *bonâ fide* performance of the agreement."

At the same time, a principle which looked solely to the compensation of the plaintiff and ignored the defendant's reasonable expectations of the maximum limit of damages which he might become liable to pay, if unable to perform the contract, would inflict hardship upon the latter; and therefore we find another rule whereby, in general, damages are restricted to the *proximate* consequences of the breach of contract. The rule on this point is commonly referred to as 'the rule in *Hadley v. Baxendale*,' which was decided in the year 1854, and may be regarded as the leading case on the subject; though the principles laid down in it have been elucidated in many important and more recent decisions. The general rule was thus expressed in the leading case:—"the damages . . . in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." It follows that (i) damage immediately and directly arising from the breach is always recoverable (as *general damage*); but (ii) *special damage*, arising from circumstances



peculiar to the case, is only compensated if the party who is sought to be made liable had, at the time of contracting, notice of, and expressly or impliedly contracted on the basis of, such special circumstances. "In order that the notice may have any effect, it must "be given under such circumstances as that an actual "contract arises on the part of the defendant to bear "the exceptional loss." Thus, if the defendant was under contract to manufacture and deliver to the plaintiff on a certain day some machinery which was delivered six months late, and the plaintiff had intended at the time of the contract to put the machinery to some novel and special use, but had not communicated his intention to the defendant, the plaintiff will not recover damages representing six months' use of the machinery in the novel and special manner, because the defendant had not contracted on the basis of that enhanced liability; but only damages for the loss which would have resulted from its normal use, even though that normal use were never intended by the plaintiff (*Cory v. Thames Iron Works* (1867) L. R. 3 Q. B. 181).

Damages are sometimes highly conjectural; and it is not always clear whether or not they are too conjectural to be assessed. Thus the loss resulting from the breach of a contract that the defendant's stallion should serve the plaintiff's mare was held, in view of the various contingencies of her conceiving and carrying and giving birth to a foal, to be too problematical for assessment; and only nominal damages were recovered. But, on the other hand, the prospects of a young woman in a 'beauty competition,' the prize in which was the offer of a theatrical engagement, were held to be capable of pecuniary assessment; and she recovered substantial compensation for the defendant's failure in breach of his contract to give her a reasonable opportunity of establishing her claims. But once a breach by one party has taken place, the other will



at any rate recover nominal damages, to mark the fact that his right to performance has been broken; whether he will recover more (supposing him to have suffered more) will depend upon the foregoing rules.

It is the duty of a person who suffers from a breach of contract to take all reasonable steps to mitigate the loss; and he cannot claim any compensation for loss which is due to his neglect to take such steps. And if the action which he has taken has actually diminished his loss, such diminution may be taken into account; even though there was no duty on him so to act.

There are three exceptions to these general rules regarding damages for breach of contract. (i) In contracts for the sale of real property which the vendor is unable to perform because, without fault or knowledge on his part, he cannot make out a good title, the purchaser can only recover his deposit together with interest and expenses of investigating title. (ii) In contracts to marry, the damages "are not limited to the pecuniary loss which the plaintiff has sustained, but may include compensation for disappointment and injured feelings" (which is not permissible in the case of breaches of other contracts, *e.g.*, a grossly wrongful dismissal of a servant). (iii) In the contract between banker and customer, a customer suing for the wrongful dishonouring of his cheque may recover general damages for the injury done to his credit.

In the case of a breach of contract to pay a fixed sum of money, no damages are recoverable except the sum itself, together with interest in certain cases. And, where it is necessary for the purpose of an English judgment, to convert damages originally expressed in terms of a foreign currency into English money, the relevant date for the conversion of the foreign currency is the date of the breach of contract, and not the

date of the judgment (*Di Ferdinando v. Simon Smits* [1920] 3 K. B. 409).

*Penalty or liquidated damages.*—Frequently the parties name in a contract a fixed sum as being payable in the event of a breach. Sometimes this sum is merely fixed *in terrorem* of the offending party, and bears no relation to the actual loss or damage likely to result, *i.e.*, is a *penalty*; sometimes it is a genuine attempt by the parties to pre-estimate the damages, whereupon it is called *liquidated damages*. The question, which of these two, penalty or liquidated damages, the sum named is, is a question of the construction of the contract, judged of as at the time of its making, in accordance with a series of rules now laid down by the House of Lords; and the use of either term, ‘penalty’ or ‘liquidated damages,’ is not conclusive. If the Court holds it to be liquidated damages, that sum can be recovered; if a penalty, then only the actual damage which can be proved in accordance with the general rules.

The rules which were deduced by the House of Lords from the authorities in the case of *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* [1915] A. C. 79, and which may be regarded as affording *primâ facie* guidance in determining the question whether in any particular case a given sum mentioned in a contract is a penalty or is liquidated damages, are summarised as follows:

(1) “Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may *primâ facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.”

(2) “The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a

“genuine covenanted” (i.e., contracted) “pre-estimate of damage.”

(3) “The question whether a sum stipulated is penalty or liquidated damages, is a question of construction, to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.”

(4) In that task of construction the following tests, if applicable to the case under consideration, may prove helpful or even conclusive:—(a) it will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount, in comparison with the greatest loss that could conceivably be proved to have followed from the breach; (b) it will be held to be penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid; (c) there is a presumption (but no more) that it is penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage. On the other hand, (d) it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.”

*Quantum meruit*.—This is an obscure expression with more legal meanings than one. The following is probably the commonest. Where A. has already performed his side of a contract wholly or in part (e.g., an author has written and delivered to a publisher the manuscript of one half of the book agreed to be published), and B. then breaks the contract in such cir-

cumstances as to entitle A. to treat it as rescinded (*e.g.*, the publisher notifies the author of his intention to abandon the publication of the book), A. has not only the ordinary right of action on the contract, for damages in respect of any loss he may have sustained from B.'s breach, but, in addition, a right to recover from B. the value of the work he has already done, *i.e.*, *quantum meruit* ('what he has earned' or 'deserved').

*Interest.*—There is a common law presumption against the recovery of interest; and, unless that presumption can be rebutted by the operation of one of the exceptions to the general rule (of which the following are the principal ones), the sum for which the successful plaintiff is allowed to sign judgment will not include any interest on the debt or damages. Interest is, however, recoverable (i) upon an express agreement between the parties, for instance, on a contract for the loan of money (but subject to the Money-lenders Acts, 1900 and 1911 (see p. 257), (ii) upon an implied agreement arising, for instance, from a special usage of trade for the allowance of interest, or, where the same parties had, in former accounts of the same description, claimed interest on the one side, and allowed it on the other; (iii) by the Law Merchant, and now by statute, upon overdue bills of exchange and promissory notes; (iv) upon certain overdue bonds; and (v) in certain circumstances arising under contracts for the sale of land, upon the purchase-money. And (vi) it has been provided generally, by the Civil Procedure Act, 1833, s. 28, that "upon  
"all debts or sums certain, payable at a certain time,  
"or otherwise," the jury may "allow interest to the  
"creditor at a rate not exceeding the current rate of  
"interest from the time when such debts or sums  
"certain were payable, if such debts or sums be pay-  
"able by virtue of some written instrument at  
"a certain time, from that time; or if payable



“otherwise, then from the time when demand of  
 “payment shall have been made in writing, so as  
 “such demand shall give notice to the debtor, that in-  
 “terest will be claimed from the date of such demand,  
 “until the term of payment.” And, by the same  
 Act (s. 29), it is further provided, that the jury may  
 give damages in the nature of interest, in actions  
 for the wrongful seizure or conversion of goods, and  
 in actions on policies of insurance; and by Order  
 58, Rule 19, of the Rules of the Supreme Court, where  
 proceedings by way of appeal are taken by the  
 defendant in a High Court action, and judgment is  
 given for the original plaintiff, interest shall be allowed  
 him for such time as execution may have been delayed  
 by the appeal. By the Judgments Act, 1838, every  
 High Court judgment debt now carries interest, at the  
 rate of four per cent., from the time of entering up the  
 judgment, until the satisfaction thereof; and such  
 interest may be levied, along with the principal, under a  
 writ of execution. Also, interest on the costs of an action  
 is allowed, as from the date of the judgment or order;  
 and this rule applies even to an interlocutory order.

(B) *Discharge of the other party.*—As we have already  
 seen (pp. 73–74), a breach of contract by one party in  
 certain circumstances entitles the other party to regard  
 himself as discharged from performance on his part, and  
 to treat the contract as at an end, except for the rights  
 of action accruing to him on the breach of contract.

The next two remedies, Specific Performance and  
 Injunction, might be regarded as the perfect and  
 normal remedies for the enforcement of contracts in  
 an ideal system of law; and it is hardly correct, though  
 sanctioned by tradition, to speak of a contract being  
 ‘enforced’ by so clumsy a makeshift as an action for  
 damages. But these two remedies that we are about  
 to describe are clearly difficult to apply, by reason



of the supervision which they demand of the Court ; and they are granted, not as a matter of right *ex debito justitiæ*, but at the discretion of the Court, *ex gratiâ*, and where the ordinary remedy by action for damages is not appropriate, or is inadequate.

(c) *Action for specific performance*.—This is an equitable remedy, specially applicable to contracts for the sale and leasing of land and to marriage articles ; but, under the Judicature Act, 1873, it can now be given in all Divisions of the High Court. The remedy is still, however, only available on equitable principles, and is not granted where the ordinary remedy by action for damages is adequate. For instance, specific performance will not be ordered of a contract to lend money (except, by statute, a contract to take up and pay for debentures), or of any contract for personal services, or of any contract of which, on the ground of hardship, uncertainty in ability to enforce it, or otherwise, it would be inequitable or inexpedient to decree specific performance. The power to grant specific performance of contracts for the sale of goods is expressly conferred by the Sale of Goods Act, 1893 ; but the jurisdiction is exercised only in exceptional cases. Specific performance will not be decreed of a gratuitous promise, even though under seal ; nor will it be decreed against, or at the suit of, an infant.

(d) *Injunction*.—Where a contract involves a negative obligation, the Court will, in a proper case, restrain a breach of it by an injunction, violation of which will expose the party to committal for contempt of court. An injunction will be granted where the contract contains a negative stipulation in express terms, and sometimes also where the contract, although affirmative in form, is negative in substance. But a term in a contract relating to personal services will not be enforced by injunction, unless it is an ‘independent

negative stipulation'; and positive expressions such as 'become sole agent' or 'give his whole time' will not be construed as including a negative term capable of enforcement by injunction (*Whitwood v. Hardman* [1891] 2 Ch. 416).

(E) *Action for a declaration*.—The Court has power in proper cases to give a merely declaratory judgment stating the rights of one or both parties to a contract, although no other relief is claimed, or could at that time be granted.

(F) *Other remedies*.—There are various other remedies applicable to special classes of contracts, *e.g.*, the right of a seller of goods to re-sell and to stop *in transitu*, the right of lien which is given to sellers, carriers, inn-keepers, &c., and a landlord's right of distress for rent in arrear. These are dealt with elsewhere in this work.

We shall now give an outline of certain important classes of contracts, which, though generally governed by the rules described in the preceding chapters, have distinguishing features which give them an individual character.

#### NOTE ON AUTHORITIES.

[The following are some of the chief sources and illustrations of the principles discussed in this chapter:—

*Taylor v. Caldwell* (1863) 3 B. & S. 826.

*Krell v. Henry* [1903] 2 K. B. 740.

*Robinson v. Davison* (1871) L. R. 6 Ex. 269.

*Hochster v. De la Tour* (1853) 2 E. & B. 678.

*Mersey Steel Co. v. Naylor Benzon & Co.* (1884) L. R. 9 App. Ca. 434.

*Wigglesworth v. Dallison* (1779) 1 Douglas, 201.

*De Lassalle v. Guildford* [1901] 2 K. B. 215.

*Hadley v. Baxendale* (1854) 9 Ex. 341.

*Horne v. Midland Railway Co.* (1873) L. R. 8 C. P. 131.

*Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* [1915] A. C. 79.

*Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416.

"*Digest of English Civil Law*," pp. 105–152.]

## CHAPTER V.

## THE CONTRACT OF AGENCY.

*General Nature.*—The contract of agency is properly regarded as a branch of the contract of employment, an *agent* being employed for the particular purpose of placing his employer (called the *principal*) into contractual relations with others. But, on account of its importance, it is desirable to deal with agency at once, leaving the other branches of the contract of employment to the later chapter on that subject. For the importance of the contract of agency lies in the fact that it may be ancillary to every other class of contract. Any person may enter into any kind of contract by means of an agent acting with his authority; and the effect is, speaking generally, precisely the same as if the principal had personally been a party to the agreement.

In order to be valid as between the principal and the agent, the contract of agency must conform to the ordinary rules applicable to all other contracts; with this exception, however, that, by a peculiarity which agency shares with certain other kinds of employment, if for no valuable consideration, and not under seal, I undertake to act as your agent, though not bound to perform that agency, yet if I once proceed to act, I must perform it efficiently, and a valid contract of agency is created between us. No particular form is necessary. But an authority to an agent to execute a deed must, unless the agent actually executes

the deed in the presence of his principal, itself be given by a deed, which is commonly called a *power of attorney*. It is not, however, necessary (in order that the principal should be bound by the agent's acts) that the agent should possess capacity to bind himself by contract. Thus an infant may be an agent; and, at a time when married women had no contractual capacity of their own, it was never doubted that a wife might be agent for her husband. But any contractual questions that may arise as to the agent's own rights and liabilities against or to the principal or third parties, will depend upon the agent's own contractual capacity.

*Modes of creation.*—Agency is usually created (i) by express agreement; but it may also arise (ii) by implication from the circumstances and conduct of the parties. For instance, if a person sends goods to a factor or broker, whose business it is to sell goods, and allows him "to assume the apparent right of disposing of property in the ordinary course of trade," he is presumed to authorise a sale of them, and thus to make the factor or broker his agent for making a contract of sale. As was said by Lord Ellenborough (*Pickering v. Busk* [1812] 15 East, at p. 43): "where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe"; in other words, the principal is estopped from denying that the factor or broker has in fact the authority which he is allowed to assume. Again, if I habitually allow a friend to buy goods for me on credit from you, and I pay your bills when you send them to me, you are justified in regarding him as my agent, with authority to buy goods of the same kind, until you receive information to the contrary.

(iii) A wife is presumed, from the fact of living with her husband, to have his authority to pledge his credit, and generally act as his agent in the management of

the household, and in keeping it adequately supplied with necessities suitable to his standard of living (including clothes for herself and for their young children); but this *primâ facie* presumption of agency may be rebutted by the husband, by proving one or more of the following facts, in which event he will incur no liability: (1) that he had already supplied her and the household with a sufficient supply of the necessities in question; or (2) that he gave her an adequate allowance of money to enable her to buy them; or (3) that he had expressly forbidden her to pledge his credit; or (4) that he had expressly notified the tradesman in question that he would not be responsible for credit purchases made on his behalf by her. Proof of any one of these four facts is enough to protect the husband; but if he has actually paid accounts rendered to him by a tradesman in respect of necessities bought by his wife upon his credit, and wishes to discontinue that arrangement and revoke her authority, he must, having thus held her out as his agent, give the tradesman notice of his revocation of her authority. The husband's liability as stated above to keep his wife adequately supplied with clothing is satisfied if he buys the clothing and merely lends it to her, so that it remains his property and is immune from seizure on behalf of her creditors; and he cannot obtain an injunction to restrain her from pledging his credit. This rebuttable presumption of agency arises, not from the fact of marriage but from the fact of cohabitation; and the authority pertains to a wife not as wife but as domestic manager. So it arises, and can be rebutted in the same way, in the case of a woman living with a man though not married to him, or of a housekeeper or of any other superior servant. (The capacity of a married woman to render her separate property liable on her contracts has already been stated; and it may be mentioned



incidentally here, that a husband can be made liable for the ante-nuptial contracts and torts of his wife to the extent of any property belonging to her which he may have become entitled to from or through her).

(iv) Agency may also be presumed from necessity. Thus, a wife who is living apart from her husband, either with his consent or as the result of his misconduct in circumstances which justify her in leaving him, has by necessity an authority to pledge his credit for necessities for herself and those of their children of whom she has the lawful custody. But the husband incurs no such liability—(1) if the separation be against his will and without sufficient excuse arising from his ill-treatment; (2) if she be dismissed from him for adultery (unless committed with his connivance), or if, during the separation, she commit adultery; (3) if she has agreed to accept from him a certain allowance for her maintenance during separation, and the allowance is regularly paid; (4) (apparently) if adequate provision is otherwise made for her while they are living apart; or (5) if, in the case of a judicial separation, alimony has been decreed to the wife, and it is duly paid. Again, the master of a ship in cases of acute necessity may even acquire from that necessity power to sell the cargo as the agent of the cargo-owner, or the ship as the agent for the shipowner. But this authority only arises in very exceptional cases, when it has become impossible to salve the ship and cargo; and every reasonable effort to get into touch with the respective owners has been exhausted. The master has also a strictly limited power of selling part of the cargo to raise money for repairs to the ship. And it seems that a carrier by land may also become authorised, in case of urgent necessity, to sell, as agent of the owner, goods being carried by him. But the liability of the husband for his wife's contracts has been already fully discussed (Vol. I., pp. 439–441).

(v) Agency may also arise from some relation between the two parties, such as that of partners (see pp. 239–241), of the proprietor and manager of a business, or of the owner and master of a ship.

(vi) Agency may be created by ratification. Although a person who purports to contract as agent for a principal, without actual or implied authority, cannot bind the principal without his consent, yet the principal may, by a subsequent ratification, become bound by and entitled to the benefit of the contract. Such a ratification dates back to the original making of the contract; and its effect is precisely the same as if the agent had been originally authorised to contract, in accordance with the principle—*omnis ratihabitio retrotrahitur ac mandato priori æquiparatur*. In order, however, that a ratification may be effectual, the following conditions must concur, *i.e.*, (1) the agent must ‘openly and avowedly’ contract as agent; (2) he must have a principal in contemplation, and in actual existence, at the time of the contract; so a company cannot ratify a contract which was made on its behalf before it was incorporated; (3) the contract must be such as the principal was at the time legally capable of entering into; (4) the principal must, at the time of ratification, have full knowledge of all material facts relating to the contract ratified, or else he must intend the ratification to take effect whatever the facts were, and in spite of his ignorance as to them. And even a tortious (but not a criminal) act by an agent may be ratified so as to make the principal liable for the tort; as where a firm of merchants in England ratified the act of their agent abroad in buying and taking possession of a ship, and, the ship having been wrongfully sold to him, made themselves liable for the tort of conversion, though they were unaware that the sale was wrongful (*Hilbery v. Hatton* (1864) 2 H. & C. 822).

*Kinds of agents.*—Agents are sometimes divided into two principal classes: (1) *general* agents and (2) *particular* or *special* agents. A general agent is one appointed to do a general class of acts, or to fill an appointment or position involving transactions of various kinds within the general scope of a certain business; *e.g.*, the manager of a shop or factory, the superintendent of a railway, or the managing director of a company. A particular or special agent, on the other hand, is one appointed for a particular occasion or purpose only. The difference between the two cases (more, however, one of degree than of kind) is with regard to the position of third persons with whom they deal. Such third persons are only concerned with the apparent, and not the actual, authority of a general agent. Therefore if a general agent, purporting to act on behalf of his principal, enters into a contract within the apparent scope of his employment, his principal is bound by the contract; notwithstanding any express limitation of the agent's authority which is unknown to the third party with whom he has contracted. But, in the case of a particular agent, a third party contracting with him does so at his own peril, unless he previously ascertains the exact extent of the agent's authority; for a particular agent only renders his principal liable for such acts and defaults as have been actually authorised by the principal, or are reasonably incidental to those authorised by him. Where, however, an agent contracts within the scope of his actual authority, the principal cannot repudiate the contract, on the ground that the agent was acting in his own, and not in the principal's, interests (unless of course the agent and the third party are together engaged in defrauding the principal); even though the extent of the authority was not known to the third party.

There are certain kinds of general agents to whom

distinctive names are applied. The following are the chief instances :—

(i) *Factors*, who are agents to whom goods are entrusted, with a discretionary power of sale. Special provisions with regard to them are contained in the Factors Act, 1889 (see pp. 114–116).

(ii) *Brokers*, who are agents employed to buy and sell goods or other property ; but not, as in the case of factors, entrusted with possession of the goods. Their authority is merely to negotiate and superintend the making of a bargain between two other persons. A broker employed in a particular trade or market has implied authority to contract according to the usages of the trade or place ; *e.g.*, a stockbroker is implicitly authorised to act according to the rules of the Stock Exchange. Neither factors nor brokers are, generally speaking, answerable for the due payment of the price by the party to whom they sell ; but a factor may make sales as a *del credere* agent, receiving on that account a higher commission from his principal. In such a case he is responsible for the price of goods sold through his agency.

(iii) *Commission agents*, who are agents employed to buy or sell goods *as principals* in one country or market, for some person in another country or market, in consideration of a commission for their services. In this case the general rule is, that no privity of contract is established between the principal and the third parties with whom the agent deals, and that the principal is not personally liable to such third parties.

(iv) *Del credere agents*, who are agents for the purpose of a sale, and expressly or impliedly guarantee to their principals the solvency of third parties in respect of contracts procured through their agency. Their undertaking is not a guarantee in the strict sense, and therefore need not be in writing under the Statute of Frauds.

(v) *Auctioneers*, who are agents with authority to



sell property by public auction. If they are employed to sell goods, they commonly have the goods in their possession. They can sell in their own name, but are not authorised to give a warranty of the goods. They are entitled to an indemnity from the owner of the goods against the consequences of acting upon his authority ; and they have a lien upon the goods sold, and upon the price, for their charges and commission.

Other familiar instances of agents who may be employed as general agents are *house and estate agents, ship brokers, insurance brokers and ship masters.*

*Legal effect of contracts made by agents.*—Where an agent contracts with a third person, the precise legal effect differs according to circumstances. The following three different classes of cases may exist. First, the agent may contract as such for a named principal. In this case the agent is a mere conduit pipe ; and, having acted as such, he immediately drops out of the transaction, the principal being solely liable on, and capable of enforcing, the contract. This may be regarded as the simple and normal type of case. But (i) there is an exception from this rule where the agent buys goods in England for a foreign principal ; in which case, by mercantile custom, there is a presumption that the agent is personally liable to the seller of the goods on the contract, and that the foreign principal is not liable to the seller. This is, however, not a rule of law, but merely a presumption which may be displaced by evidence of contrary intention ; and it is not confined to contracts for the sale of goods, though usually arising in those cases. Similarly, (ii) an agent who contracts by a deed, in which his principal is not expressly named as a party, incurs personal responsibility. So, too, (iii) where a marine policy of insurance is effected on behalf of the assured by a broker, the latter is directly responsible to the



insurer for the premium; and (iv) if an agent signs a bill of exchange in his own name, and not in the name of his principal, the agent, and not the principal, is liable on the bill.

Second, the agent may contract for a principal whose existence is disclosed, but not his name. In this case, if the agent expressly contracts as agent, and not so as to pledge his own personal credit, the principal, and not he, is the one to sue and be sued on the contract. But, on the other hand, if there is nothing on the face of the contract to show that he acts only as agent, he is *primâ facie* liable; and the third party, on discovering the principal, can elect whether to treat him or the principal as the person responsible upon the contract.

Third, the agent may contract in his own name, without disclosing either the name or existence of the principal. In this case, the other party to the contract has the option, within a reasonable time after ascertaining the identity of the principal, to elect to treat either the agent or the principal as the person with whom he contracted. But, having once exercised his option by some unequivocal act, he must abide by it; and, apparently, judgment recovered against the agent, even though unsatisfied, precludes an action against a principal who is subsequently discovered. And if the third party has, by his conduct or representations, induced the principal to prejudice himself, for instance, by making a payment to the agent in respect of goods bought by him from the third party, under the belief that the third party has given credit in the matter to the agent personally, he cannot afterwards sue the principal.

When an agent contracts in his own name for an undisclosed principal, in circumstances calculated to induce a third party to regard the agent as a principal, and the principal afterwards sues to enforce the contract against the third party, the latter may set off

a debt due from the agent to himself. This is on the ground that “the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief” (*Cooke v. Eshelby* (1887) L. R. 12 App. Ca. 271).

*Liability of an unauthorised agent.*—A person who purports to contract as agent on behalf of a principal who is not in existence, for instance, a company not yet incorporated, may himself be held personally liable on the contract as a principal. But where a possible principal is in existence, a person who purports to contract as agent for a named principal or otherwise, but, in fact, either has no actual authority at all, or has exceeded his authority, or had an authority which has since been determined, is implied by law to have warranted to the third party that he had authority; and is therefore liable to the third party, not on the supposed contract, but for damages for breach of his implied warranty of authority, whether he acted fraudulently or innocently in the matter. This rule does not, however, apply to a contract made by a public servant as agent for the Crown. The action against an agent for breach of implied warranty of authority is an action on a contract, the consideration for the agent’s promise or warranty being the fact of the third party entering into the transaction with the professed agent. If the agent acted fraudulently, then an action of Deceit would lie (*Collen v. Wright* (1857) 8 E. & B. 647).

*Duties of an agent.*—As between himself and his principal, an agent must strictly adhere to his instructions, and not exceed the authority given to him. He must use due diligence in carrying out his agency; and, where his duties are of a confidential nature

(such as to report upon the financial standing of a person or company), he is under a duty to keep his principal's instructions secret. In accordance with the maxim : *delegatus non potest delegare*, he must not delegate his authority, at all events except so far as to obtain merely ministerial assistance, or to employ qualified sub-agents, in cases where the nature of the business implies an authority to do so. The right to delegate on the ground of urgent necessity may also sometimes arise ; but is confined to certain well-recognised cases, such as the master of a ship. Agency is sometimes said to be a contract *uberrimæ fidei* ; but this must be understood, not in the sense in which, as we have already seen (pp. 64–65), it applies to contracts of insurance and certain others, that is, that a general duty of disclosure of all material facts is laid upon one or both parties in the process of the formation of the contract, but as meaning that, once the contract has been made, the agent must act with the utmost good faith towards his principal, must give him full information upon what he is doing, and must not, being employed to sell, himself buy from his principal or, being employed to buy, himself sell to his principal, without disclosing the facts to him. He must account fully to his principal for the subject-matter and profits of his agency ; and in particular must not make any secret profit, whether in the shape of a bribe, or surreptitious commission, or otherwise. The effects of any corrupt agreement between the agent and the third party may be summarised as follows :

- (i) the principal may repudiate the contract made by the agent on his behalf on the ground of fraud, the actual effect of the corrupt agreement being immaterial ;
- (ii) the principal may recover the amount of the bribe or secret profit from the agent ;

- (iii) he may (except in cases where the agent has not been actually dishonest) withhold payment of the agent's legitimate remuneration, or may recover it back from him if already paid :
- (iv) he may sue the agent and the third party as being jointly and severally liable to him for any loss sustained by him in consequence of their fraud, and need not in estimating the damages give credit (at any rate to the third party) for anything which he may have recovered from the agent on account of the bribe or secret profit ; and
- (v) the giving and receiving of bribes or illicit commissions are made criminal offences by the Prevention of Corruption Act, 1906.

*Rights of an agent against his principal.*—An agent is entitled to the commission or remuneration, if any, agreed on ; and he has an implied right to be fully reimbursed and indemnified by the principal in respect of all reasonable expenses and liabilities properly incurred in carrying out the agency. This right includes an indemnity against the consequences of a tort committed by the agent in pursuance of his principal's instructions, if the act was not obviously unlawful, and the agent did not know it was unlawful ; for instance, where an auctioneer makes himself liable for the tort of conversion by selling and delivering possession of the goods of another person on my instructions when he supposes the goods to be mine. The right of reimbursement does not, of course, apply where by express statute it is excluded, *e.g.*, by the Gaming Act, 1892 (pp. 52–53). In certain cases, also, an agent may have a *lien* upon the subject-matter or proceeds of the agency for his commission and expenses, *e.g.*, in the case of auctioneers, brokers, factors, masters of ships, &c. (For liens, see pp. 163–166.)



*Termination of agency.—Revocation.* The authority of an agent is, in general, revocable by the principal at any time before it is executed. But if the authority is ‘coupled with an interest,’ i.e., given for the purpose of securing some benefit to the agent, it is irrevocable. In any case, a revocation of the authority of a person who has been clearly held out by the principal as an agent for him, is not effective as against third persons afterwards dealing with the agent without notice of the revocation.

*Bankruptcy.* The bankruptcy of the principal terminates the authority of the agent, as from the date of the first act of bankruptcy within three months preceding the date of the presentation of the petition on which he was made bankrupt, with certain reservations in favour of the agent and third parties dealing with him without notice of any available act of bankruptcy and before a receiving order is made. On the other hand, the effect of the agent’s bankruptcy upon his authority depends upon the nature of the acts he is authorised to do.

*Death.* The death of either principal or agent terminates the authority of the agent, even though unknown to the surviving party.

*Insanity.* It has been held, that the retainer of a solicitor for purposes of litigation is determined by the insanity of the client, though the solicitor is ignorant of the insanity; and if, as seems probable, the principle of this decision is applicable to agency generally, an earlier case in which a husband was held liable, on recovering his sanity, for contracts made on his behalf while he was insane, must be regarded as being no longer good law. It also seems clear that an agent who continues to act in ignorance of the termination of his authority by the death or insanity of the principal, is liable to a third party who is equally ignorant for a breach of his implied warranty of authority.



*Becoming an alien enemy.* If either principal or agent becomes an alien enemy in the territorial sense (p. 32), so that communication between them would involve intercourse with the enemy, the agent's authority is terminated; though, in a case where the principal had given a power of attorney, expressed to be irrevocable for a year, to sell leaseholds, and the agent entered into an agreement to sell and then the principal became an alien enemy, it was held that the authority was not terminated, and the agent could compel the purchaser to complete the transaction and accept an assignment of the leaseholds.

Finally, special provisions have been made by the Conveyancing Acts, 1881 and 1882, as to protecting persons dealing in good faith upon powers of attorney without notice of revocation and as to making powers of attorney irrevocable for a fixed period.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the Contract of Agency the student will find it useful to refer to Bowstead, "*Digest of the Law of Agency*" (Sweet & Maxwell); "*Digest of English Law*," pp. 52-66, 228-243.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

- *Pickering v. Busk* (1812) 15 *East*, 38.
- Jolly v. Rees* (1863) 15 *C. B. N. S.* 628.
- Debenham v. Mellon* (1880) *L. R.* 6 *App. Ca.* 24.
- Keighley Maxted & Co. v. Durant* [1901] *A. C.* 240.
- Kelner v. Baxter* (1866) *L. R.* 2 *C. P.* 174.
- Lloyd v. Grace Smith & Co.* [1912] *A. C.* 716.
- Puterson v. Gandasequi* (1812) 15 *East* 62; 2 *Smith's Leading Cases*.
- Thomson v. Davenport* (1829) 9 *B. & C.* 78; 2 *Smith's Leading Cases*.
- Collen v. Wright* (1857) 8 *E. & B.* 647.
- De Bussche v. Alt* (1878) 8 *Ch. D.* 286.
- Salford Corporation v. Lever* [1891] 1 *Q. B.* 168.
- Yonge v. Toynbee* [1910] 1 *K. B.* 215.]

## CHAPTER VI.

## THE CONTRACT OF SALE OF GOODS.

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*What is a contract of sale?*—There are two contracts which it is desirable at the outset to distinguish from the contract of sale of goods: (1) *exchange* or *barter*, which is the exchange of goods for goods; and (2) a *contract for work and labour*, which is a species of the contract of employment. In the second case, the distinction is sometimes a fine one; the test is not “whether the value of the work exceeds that of the “materials used in its execution”; and, as Lord Blackburn once said: “If Benvenuto Cellini had contracted “to execute a work for another, much as the value “of the skill might exceed that of the materials, the “contract would have been, nevertheless, the sale of “a chattel.” The matter has been put thus by a writer on the subject: “If the contract is intended “to result in transferring for a price from A. to B. “an article in which B. had no previous property, it “is sale”; so the making of a set of artificial teeth, and the dispensing of a medical prescription, have both been held to be contracts of sale.

The law of sale of goods is now regulated by the Sale of Goods Act, 1893, which is a codifying statute. By that Act a contract of sale of goods is defined as “a contract whereby the seller transfers or agrees to “transfer the property in goods to the buyer for a “money consideration called the price.” Thus it will be seen that the definition includes two perfectly

distinct though (in some cases) simultaneous events, viz., the negotiation for a transfer of property and the actual transfer of that property. This fact is recognised by the Sale of Goods Act; and, accordingly, where, under a contract of sale, the property in the goods is actually transferred from the seller to the buyer, the contract is called a 'sale'; where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an 'agreement to sell.'

The term 'goods' as defined by the Act, comprises "all chattels personal, other than things in action and "money," and thus includes "emblemments, industrial "growing crops, and things attached to or forming "part of the land, which are agreed to be severed "before sale, or under the contract of sale."

*When the property vests in the purchaser.*—The rules as to when the property in the goods sold legally vests in the buyer are stated in sections 16 to 20 of the Act. They may be shortly summarised as follows:—

(a) The property in unascertained goods does not pass to the buyer until the identity of the goods is ascertained. Goods in bulk (*e.g.*, so many hundred-weight of sugar) are for this purpose "ascertained," if and when the agreed quantity has been set apart and unconditionally appropriated to the contract, by one party with the assent of the other party.

(b) The property in specific or ascertained goods, that is, "goods identified and agreed upon at the "time a contract of sale is made," *e.g.*, a hat, a bicycle, or a piano which I choose in a shop, passes when the parties agree it shall pass; but in the absence of special agreement the following rules apply:—

(i) If specific goods ready for delivery are sold under an unconditional contract, the property vests in the purchaser as soon as the contract is made; but if

something remains to be done to such goods to render them deliverable, the property does not pass until this is done, and the buyer has notice of the fact.

(ii) Where specific goods are sold in a deliverable state, but subject to their being weighed, measured, or tested for the purpose of ascertaining the price (*e.g.*, if A. sells to B. all the sugar, of unascertained amount, in a particular warehouse, at so much per hundred-weight), the property does not pass until the price is so ascertained, and the buyer has notice of it.

(iii) If goods are delivered ‘on approval,’ or ‘on sale or return,’ the property passes to the buyer as soon as he either signifies his acceptance, or does any other act adopting the transaction, *e.g.*, retains the goods without notice of rejection beyond the time limited for their return, or for an unreasonable time. An act adopting the transaction is one which the buyer would have no right to do unless he treats himself as having bought the goods, *e.g.*, pawning them.

(iv) If the seller in any case, notwithstanding delivery, reserves the right of disposal of the goods until some condition is fulfilled, the property does not pass until such condition is in fact fulfilled; ‘reserving the right of disposal’ means ‘retaining control over the goods.’ One illustration is the shipment of goods to the buyer on a bill of lading which makes them deliverable to the seller or his agent.

The question of the time at which the property vests in the purchaser is very material, as determining who shall bear the loss in case the goods are accidentally destroyed after the contract of sale, but before delivery to the purchaser. It may also be very material in cases where the purchaser has resold the goods to a third person, and, in the case of either party’s bankruptcy, in deciding whether the property in the goods passes to the trustee in bankruptcy, or not.

It must be borne in mind, however, that there is

a great distinction between the vesting of the property in goods and the vesting of the right to the possession thereof ; for, in the case of a sale of specific and finished goods for ready money, the purchaser cannot, apart from agreement in the contract, take the goods until he pays or tenders the whole price agreed on ; payment and delivery being concurrent conditions. But if he tenders the money to the vendor, and the latter refuses it, the purchaser may have an action against the vendor for detaining the goods. For the goods are his (the purchaser's) property ; and his right to them is subject only to the payment of the price, for which tender is, for this purpose, an equivalent.

*Form of contract.*—By section 4 of the Act (re-enacting, with slight alterations, section 17 of the Statute of Frauds), it is provided that no contract for the sale of any goods of the value of £10 or upwards shall be enforceable by action unless the buyer shall either : (1) accept part of the goods, and actually receive the same ; or (2) give something in earnest to bind the bargain, or (3) in part payment ; or (4) unless some memorandum or note in writing of the bargain be made and signed by the party to be charged, or his agent in that behalf. If for any reason the contract also falls within section 4 of the Statute of Frauds (see pp. 26–29), it is not enough to comply with the Sale of Goods Act ; the Statute of Frauds must also be complied with. Thus, for example, an oral contract for the sale of goods wherein the periods both of payment and delivery extend beyond a year, cannot be enforced ; even though there has been acceptance of part of the goods by the buyer.

A few words must be said about the first of these alternative requisites—acceptance and actual receipt, which are two different things and must both happen. if the alternative is to be satisfied.



‘Accept’ is used in a technical sense, which must be carefully distinguished from other meanings, *e.g.*, the acceptance of an offer, or the acceptance of goods under s. 35 of the Act in performance of the contract. Here it means the doing by the buyer of “any act in relation to the goods which recognises a pre-existing contract of sale,” *i.e.*, some act such as taking and examining a sample from the bulk when delivered to him, which is evidence that he was expecting goods of that kind to be sent to him.

It is further provided by the Sale of Goods Act, s. 4, that the requisites above stated shall apply to every contract for the sale of goods of the value aforesaid; notwithstanding that the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured, or provided, or fit or ready for delivery, or that some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Further, it is to be observed, that where the contracting parties rely on the memorandum or note in writing, such memorandum or note must be of the same kind as is required in the case of the like memorandum or note under the fourth section of the Statute of Frauds, and must contain all the essential terms of the contract (see pp. 28–29); except that, where no price is fixed by the parties, a promise to pay a reasonable price will be implied. On a sale of goods by auction, the auctioneer may in general sign as agent for the buyer as well as for the seller; where such sales are (as they usually are) required to be evidenced by a memorandum or note in writing.

Finally, it should be noted, that the section does not say that in the absence of at least one of these requisites the contract is void. It “shall not be enforceable by action”; but there are other indirect ways in which

it may have some legal effect. And one distinguished judge has asserted *obiter* that, if the goods are specific, the property in them passes under such a contract to the buyer (*Taylor v. Great Eastern Railway* [1901] 1 K. B. 774). But this view is not universally accepted ; and the point remains for decision.

*Lien and stoppage in transitu.*—The unpaid seller of goods who is in possession of them is entitled (subject to the provisions of the Act) to retain possession of them until payment or tender of the price—(i) where the goods have been sold without any stipulation as to credit, (ii) where the goods have been sold on credit but the term of credit has expired, (iii) where the buyer becomes insolvent. This right (which is known as the seller's right of 'lien') is lost (i) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods, (ii) when the buyer or his agent lawfully obtains possession of the goods, and (iii) by waiver of the right. (For liens, see pp. 163–166.)

If the seller of goods transmits them to the buyer, without receiving payment of the price, and afterwards becomes apprised that the buyer is insolvent, the law allows the seller the privilege of stoppage *in transitu* ; that is to say, the law entitles the seller, while the goods are still in their transit, and not yet actually received by the buyer, to resume possession of them, and retain them until payment or tender of the price. The question as to the exact time during which goods are deemed to be *in transitu*, depends on the circumstances of each case ; but, generally speaking, the period of transit is deemed to continue until the goods have actually reached the hands of the buyer himself or of his agent for that purpose, either on or before their arrival at the appointed destination, or until, after their arrival, the carrier acknowledges to

the buyer or his agent that he holds the goods on his behalf, or until the carrier has wrongfully refused to deliver the goods to the buyer or his agent. The right of stoppage will not be affected by the seller having consigned the goods to the buyer under a bill of lading ; but, if any person to whom the bill has been lawfully transferred, as buyer or owner, transfers the document to a third party, who takes it in good faith and for valuable consideration, the right of such third party is paramount to the unpaid seller's lien or right of stoppage *in transitu* (s. 47). Such a transfer, if by way of sale, defeats the right of stoppage *in transitu* absolutely ; if it be by way of pledge or charge only, the right of the unpaid seller is not defeated thereby, but can only be exercised subject to the pledge or charge (*Cahn v. Pocket's Co.* [1899] 1 Q. B. 643). The exercise by the seller of his right of lien or of stoppage *in transitu* does not operate of itself to rescind the contract ; unless the seller resells the goods, as, in certain cases, he is entitled to do. Strictly speaking, the unpaid seller's rights of lien and stoppage *in transitu* come into existence when the property in the goods has passed ; and, till then, it is more correct to say that he has, in the words of the Act, " a right of withholding delivery similar to and co-extensive with " his rights of lien and stoppage *in transitu* where the " property has passed to the buyer."

*Acquisition of title.*—The general rule of English law is, that no man can confer a better title to a chattel personal than he himself has, according to the maxim : *Nemo det quod non habet* ; yet goods may, in certain cases, be effectually transferred to a purchaser by one who has himself no title, or only a defective title, to them. The most important cases of this kind are sales in market overt, sales under a voidable title, and sales by factors and others under the Factors Act, 1889.

*Sales in market overt.*—Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, notwithstanding that the seller does not own them and has no right to sell them, provided that the buyer buys them in good faith and without notice of any defect or want of title on the part of the seller. Market overt, in the country, is a market held on the special days provided as market days, for particular towns, by charter or prescription; but in the City of London every day, except Sunday, is a market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is also, in the country, the only market overt; but in the City of London every shop in which goods are exposed publicly for sale is a market overt, though only for such things as the owner ordinarily trades in there. In the words of the head-note to the *Case of Market Overt* in 1596 (5 Rep. 83): “If plate be stolen and sold openly in a scrivener’s shop on market-day, this shall not alter the property; otherwise if it had been in a goldsmith’s shop.”

The sale must take place wholly in the market, and during the usual business hours; and the buyer must not be aware of any defect in the seller’s title or power to dispose of the goods. It must take place in some public part of the shop, to which the general public have access; and so a sale in a showroom on the first floor above a shop in the City of London, into which customers were sometimes specially invited, was held not to be a sale in market overt (*Clayton v. Le Roy* [1911] 2 K. B. 1031).

But there are certain circumstances in which the rule of market overt does not apply so as to pass a title to the goods:—(1) if the goods be the property of the Crown; (2) if a man buys his own goods in market overt, the sale does not bind him, unless the



property had been previously altered by a former sale ; and, notwithstanding any number of intervening sales, if the original seller, who sold without having the property, should come again into possession of the goods, the right of the original owner revives ; (3) (probably, though the point has not yet been definitely decided) the rule does not extend to protect and validate sales *to* a shopkeeper in his shop.

It has been provided by section 24 of the Act, that where there has been a *bonâ fide* purchase in market overt of property *stolen* from its former owner, and the former owner has prosecuted the offender to conviction, thereupon the property in the goods will re-vest in him (whether he has or has not obtained an order for restitution from the convicting judge), notwithstanding the intervening sale in market overt. But the re-vesting is suspended for a period of ten days, during which time the thief may appeal from his conviction, and, in the event of his lodging an appeal, then until it has been determined (Criminal Appeal Act, 1907, s. 6). The *bonâ fide* purchaser may receive such (if any) compensation, out of the property of the thief, as the convicting judge may direct.

*Horses.*—A purchaser obtains no property in a stolen horse, unless he not only buys it in a fair or market overt, but also in accordance with the directions of certain statutes of Philip and Mary and of Elizabeth. Among the chief of those requirements are, that a horse so purchased must have been openly exposed in the time of such fair or market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable, and that even such sale should not take away the property of the owner, if, within six months after the horse was stolen, he put in his claim before some magistrate in the place where the horse was found.



and within forty days more after such claim proved his property, by the oath of two witnesses, and tendered to the person in possession such price as the latter *bonâ fide* paid for the horse in market overt.

*Sales under voidable title.*—If my goods are stolen, or in any other way wrongfully taken from me, and sold otherwise than in market overt, my property therein is not altered; and I may re-take them wherever I find them, even from an innocent purchaser, provided that I can do so without committing a trespass, or a breach of the peace. On the other hand, where the acquisition from me is voidable only (as in cases of fraud not involving fundamental operative mistake (see pp. 60–61)), and a *bonâ fide* purchaser acquires the goods before I elect to avoid the transaction, such purchaser will have a good title; and I cannot re-take the goods. If I deny the *bonâ fides* of the purchaser, the burden of proof is on me. But if the fraud involves operative mistake, *e.g.*, as to the identity of the other contracting party where that was material to the transaction, then the acquisition of the goods from me will be not merely voidable, but absolutely void; and a *bonâ fide* purchaser from the swindler who deceives me into giving him possession of the goods, will obtain no title to the goods at all.

*Sales under the Factors Act, 1889.*—At Common Law, if a factor or broker (see p. 97), or any agent entrusted with the possession of goods, disposed of them to a stranger in a way not warranted by the nature of his authority, or if he pledged them when authorised only to sell, the title so derived from him would have been ineffectual against his principal. But, for the protection of third persons dealing with factors and other persons entrusted with the possession of goods, or with the written *indicia* of property therein, various statutes

were passed in the course of the nineteenth century, the chief now in force being the Factors Act, 1889.

This Act, then, deals with the powers of “a mercantile agent, having in the customary course of his business, as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods”; and its chief object is, as we have said, to protect persons who deal with such agents. With this object, it provides, that any disposition by such a person, in the ordinary course of business, either of the goods or of the documents of title to goods, with which he has been entrusted, shall, so far as his principal is concerned, be unimpeachable on the ground that he (the agent) exceeded his authority; provided that the person taking under such disposition has acted *bonâ fide*, and has given value. But there is a special provision, that when a factor pledges the goods of his principal to secure an *existing* debt, already due from the factor to the pledgee, the latter shall acquire no further right to the goods than could have been enforced by the factor (against his principal) at the time of the pledge; and another that, where goods are pledged by a factor in consideration of the delivery of other goods or documents of title to goods, or a negotiable security, the pledgee will acquire no interest in the goods so pledged in excess of the value of the goods or security when so delivered or transferred in exchange. It is, however, now settled, that a pledge made by a factor who had only authority to sell, is protected by the Act.

The Factors Act, however, is not confined to the subject of factors; for (ss. 8, 9) a seller of goods who retains the goods or the documents of title thereto, with the buyer's consent, and, conversely, a buyer of goods who obtains possession of the goods or the documents of title with the seller's consent, can, in effect, as

against the other party to the sale, confer on a person who deals in good faith with him a title to the goods. These provisions have been re-enacted by the Sale of Goods Act, 1893, s. 25.

*Implied warranties and conditions.*—Apart from the question of what title in fact passes to the buyer of goods by a sale, there arises the further question what liability for defects of title or other defects a seller of goods incurs. Such liabilities may be either *express*, i.e., the result of actual arrangement between the parties, or *implied*, i.e., imposed by law in the absence of actual agreement to the contrary. And both may be either in the nature of *conditions* or of *warranties*; the differences between which are important.

A condition is a term in a contract, the breach of which gives the other party a right to treat the contract as at an end, if he wishes to do so; a warranty (as has been before explained (p. 63)) is a collateral or ancillary agreement by the seller, breach of which merely entitles the buyer to damages. But a buyer may waive a condition and treat its breach as a breach of warranty; and in certain circumstances, *e.g.*, when the property in specific goods has passed, the buyer can, generally, only treat the breach of a condition as a breach of warranty. If I sell B. a horse on the express stipulation that, if he turns out not to be sound or not to have been hunted with the Quorn pack, B. may return him and recover the price, that stipulation creates a condition. But if I merely warrant the horse sound, and he proves unsound, B. can only obtain damages from me for breach of my undertaking. The following are the conditions and warranties implied in a contract for the sale of goods.

*As to title.*—The Act provides that, in the absence of contrary expression or implication, a contract of

sale shall be deemed to contain an implied *condition* that the seller has a right to sell, and implied *warranties* for quiet possession and freedom from undisclosed incumbrances.

*As to quality or fitness.*—The Act provides that the seller of goods shall be deemed to give certain conditions and warranties, the chief of which are the following :—

(i) Upon a contract for the sale of goods by description, there is an implied *condition* that the goods shall correspond with the description ; and this is so, even when the sale is by sample as well as by description.

(ii) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied *condition* that the goods shall be reasonably fit for such purpose ; except that, in a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for any particular purpose. Purchases of food usually obtain the benefit of this condition ; and if human consumption is the obvious purpose for which they are bought, it is not necessary to point this out to the seller.

(iii) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied *condition* that the goods shall be of merchantable quality ; except that, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed. So a sale of poisonous beer by the tenant of a ' tied ' public-house has been held to be a sale by description,



because the beer of only one brewing company was obtainable there, and not a sale in such circumstances as to show that the buyer relied on the seller's skill or judgment (*Wren v. Holt* [1903] 1 K. B. 610).

(iv) Upon a contract for the sale of goods by sample, there are the following implied *conditions* :—

- (a) that the bulk shall correspond with the sample in quality ;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample.

Except in the above cases, there is no implied condition or warranty as to quality or fitness ; the maxim in other cases being, *caveat emptor*.

Of course, there may in all cases be, as we have said above, if the parties so choose, an *express* warranty or condition, either as to title or as to the soundness or other quality of the articles. And the use of the word 'warrant' is not in any case essential. For a mere representation may amount to a warranty, if a warranty was thereby intended ; and the intention will be a question for the jury, provided that the Court thinks there is sufficient evidence upon which a jury could find such intention to exist.

Whether an express stipulation in a contract of sale is a *condition*, the breach of which may give rise to a right to treat the contract as repudiated, or a *warranty*, the breach of which merely gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

Apart from any express or implied warranty, a



seller of goods will be liable for fraud if, knowing goods to be faulty, he represents them to be sound, or uses any art to disguise the defect, and thereby actually deceives the buyer. Further, a seller who knows, or has reason to believe, goods sold by him to be dangerous, and fails to warn the buyer of the danger, or who so carelessly manufactures goods sold by him as to render them dangerous, will be liable for his negligence to a buyer who suffers damage by using them; and even to a person, not being a buyer, for whose use he knows the goods to be purchased, at any rate when the goods sold are intrinsically dangerous.

*Performance of the contract.*—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; and the place of delivery is the seller's place of business, if he have one, and, if not, his residence. Delivery may be actual or constructive, *brevi manu* or *longi manu* (Vol. II., pp. 531–2), e.g., by the indorsement and delivery of a bill of lading, or may be effected by the acknowledgment of the seller's bailee to the buyer that he holds the goods on the buyer's behalf. Delivery to a carrier in pursuance of the contract of sale, whether he is named by the buyer or not, is *primâ facie* delivery to the buyer. If less than the contract quantity of goods is delivered, the buyer may either accept it at a proportionately reduced price, or may reject it; if more, he may accept the whole at a proportionately increased price, or may reject the whole, or accept the contract quantity and reject the rest. If the seller delivers the goods he contracted to sell mixed with goods of a different description, the buyer may reject the whole, or accept those which are in accordance with the contract and reject the rest. The buyer is entitled to have a reasonable opportunity

of examining goods of which delivery is tendered to him, and which he has not previously examined; and he is not deemed to have accepted them until he has had that opportunity of ascertaining whether they are in conformity with the contract or not. But he is deemed to have accepted them when he intimates to the seller that he has done so, or when he does any act in relation to them which is inconsistent with the seller's ownership, or when he retains the goods for a reasonable time without intimating to the seller his rejection of them. Once the buyer has accepted, the property in the goods passes to him (if it has not already done so, *e.g.*, on a sale of specific goods). It then becomes too late for him to reject them for breach of condition (apart from some special cases); though it may still be possible for him to obtain damages for a breach of warranty, or a breach of a condition treated as a breach of warranty.

*C.i.f. and f.o.b.*—It may be convenient here to explain, very briefly and in broad outline, the terms which are commonly used to describe two of the principal forms which a contract for the sale of merchandise overseas may assume. (i) A 'c.i.f.' (or 'c.f.i.') contract, often verbalised as 'sif,' is one in which the seller undertakes to supply the goods, to place them on board the ship, and to arrange for their transport to the destination indicated by the buyer and for their insurance; he then makes out an invoice for the goods, upon which the essential items will be (*a*) the price, (*b*) the cost of placing them on board the ship, (*c*) the freight (less any part of it payable by the buyer on taking delivery), and (*d*) the insurance premium. Finally, he tenders to the buyer what are called the 'documents,' of which the essential components are the bill of lading (or other contract of affreightment), the policy of insurance, and the invoice; thus the

buyer will either receive the goods if they arrive, or be able to recover their value upon the policy of insurance if they are lost, or the amount of their damage if they are damaged. (See, for a description of this transaction by Lord Sumner, *Biddell Brothers v. E. Clemens Horst Co.* [1911] 1 K.B. at p. 220). Thus a sale of coal at '£5 a ton c.i.f. Barcelona' means, that the £5 covers the cost of the coal at the pit-head, and all the intermediate expenses incurred in transporting it thence to Barcelona, including the cost of insurance.

(ii) The other type of overseas contract of sale we shall mention is an 'f.o.b.' contract; whereby the seller merely undertakes to supply the goods and place them 'free on board' the carrying ship, in such a case usually provided, or arranged for, by the buyer, who pays the freight and the cost of insurance. Thus, a sale of coal at '£3 a ton f.o.b. Cardiff' means, that for that sum the seller (whether a colliery owner or a coal exporter) will supply the coal, arrange for its transport from the pit-head to the Cardiff docks, and there put it on board the ship nominated by the buyer.

*Remedies for breach of the contract.*—(1) *The seller's remedies.* In addition to the rights of the unpaid seller (already described, pp. 110–111) of lien and stoppage *in transitu* where the property has passed, and his similar and co-extensive rights where it has not passed, and his right of re-sale in certain cases, the seller has (i) an action for the price in two cases: the first, where the property in the goods has passed to the buyer; the second, where the price is payable on a day certain irrespective of delivery, although the property has not passed; and (ii) an action for damages for non-acceptance, when the buyer wrongfully neglects or refuses to accept and pay for the goods.

(2) *The buyer's remedies* are (i) an action for damages for non-delivery (the measure of damages, both general and special, in this case and in the case of the seller's action for damages for non-acceptance being regulated by the rules we have already discussed (pp. 81–84), with the addition, that where there is an available market for the goods, the measure is *prima facie* the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered or accepted (as the case may be), or, if no time was fixed, then at the time of the refusal to deliver or accept ;

(ii) in the case of specific or ascertained goods, the Court may, if it thinks fit, order the specific performance of the contract, without giving the defendant the option (which he had formerly) of retaining the goods on payment of damages ;

(iii) in certain circumstances, the buyer may reject the goods for breach of condition ;

(iv) he may bring an action for damages for the breach of a warranty by the seller (or of a condition treated as a warranty), or set up those damages in diminution or extinction of the price ;

(v) where the property in the goods has passed to him and they are withheld from him, he may bring an action of Detinue or Conversion (pp. 362–365) ;

(vi) in certain circumstances, he may bring an action to recover the price as money paid, for which the consideration has failed.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the Contract of Sale of Goods the student will find it useful to refer to Sir M. D. Chalmers' "*Sale of Goods Act*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Lee v. Griffin* (1861) 1 B. & S. 272.

*Taylor v. Great Eastern Railway* [1901] 1 K. B. 774.

*Lickbarrow v. Mason* (1788) 2 T. R. 63; 1 *Smith's Leading Cases*.

*Cahn v. Pocket's Bristol Channel Co.* [1899] 1 Q. B. 643.

*Case of Market Overt* (1596) 5 Rep. 83.

*Clayton v. Le Roy* [1911] 2 K. B. 1031.

*Cundy v. Lindsay* (1878) L. R. 3 App. Ca. 459.

*Phillips v. Brooks* [1919] 2 K. B. 243.

*Weiner v. Harris* [1910] 1 K. B. 285.

*Ward v. Hobbs* (1878) L. R. 4 App. Ca. 13.

*Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608.

*Wren v. Holt* [1903] 1 K. B. 610.

*Wallis v. Pratt* [1911] A. C. 394.

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“*Digest of English Civil Law*,” pp. 161–183.

*Sale of Goods Act*, 1893.]

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## CHAPTER VII.

## BILLS OF EXCHANGE.

IN this chapter we shall consider, firstly, the meaning of negotiability, which is one of the most prominent characteristics of bills of exchange and promissory notes; and secondly, bills of exchange in general. In the next chapter we shall deal with promissory notes, with that kind of bill of exchange which is called a cheque, and with the contract between bankers and their customers.

(1) NEGOTIABILITY.—We have already (Vol. II., pp. 587–596) examined the assignability of choses in action (to which category the debt evidenced by a bill of exchange or a promissory note belongs); and we saw that, both in Equity and under the Judicature Act, 1873, though with certain differences, the owner of a chose in action can transfer his right in it to another. We saw, further, that the assignment of a chose in action, whether in Equity or under the statute, involved two essential features: (i) notice of the assignment must be given to the debtor; and (ii) the assignee obtains no better title than the assignor had, but takes the chose in action subject to all ‘equities’ (*i.e.*, legal or equitable rights and claims of third persons) subsisting against the assignor and affecting the chose in action at the time of the assignment, whether the assignee has notice of those ‘equities’ or not. For instance, A. owes B. £50, but A. has a set-off against B. amounting to £25. B. assigns to C. the sum of £50 owed to him

by A. and says nothing to C. about the set-off. C. gives to A. notice of the assignment and demands of him £50. A. can set off £25. and need only pay C. £25. That is assignability.

The advantages to persons engaged in mercantile transactions, whether inland or overseas, of being able to pay a debt or remit money for some other purpose without actually sending gold and silver coins, are obvious. If I, being in London, owe £50 to a merchant in Florence, and a merchant in Venice owes me £50, how much safer and simpler it is that I should instruct my Venetian debtor to pay £50 to my Florentine creditor, and so cancel my indebtedness, rather than that the Venetian should send fifty golden sovereigns or their equivalent to London, and that I should then send them back again to Florence! My written instructions to the Venetian to pay that £50 to the Florentine substantially take the form of what is now known as a 'bill of exchange.' And the method is equally convenient to avoid the transmission of money, say, from London to York. If I, being in London, have a creditor and a debtor in York, and the sum owed to me is at least as large as the sum I owe, I should find it convenient to instruct my York debtor to pay my York creditor the amount I owe the latter. Again, if I have no debtor in Italy or in York, I shall be able to find some merchant or banker in London who has funds at his disposal in Italy and in York, and, by making the necessary payment to him in London, I shall be able to obtain from him, for transmission to Florence and to York respectively, pieces of paper containing his written instructions or authority to his correspondents in those places to make the required payments to my creditors.

In some such way, and to meet needs of these kinds, the mercantile community of Europe developed the bill of exchange; and those who wish to examine

the origins of this interesting legal institution will find some light upon the subject in the judgment of Cockburn, C.J., in *Goodwin v. Roberts* (1857) L.R. 10 Ex. at p. 346, and in several articles in the Law Quarterly Review, by Edward Jenks, L.Q.R., IX. p. 70, and by W. S. Holdsworth, L.Q.R. XXXI. 12, 173, 376; XXXII. 20.

In fact, merchants were gradually inventing a paper currency; and, to achieve the purposes required of a currency, it was essential that this new method of remitting money should possess one of the chief characteristics of cash, namely, that any person taking it in good faith and for value should acquire a perfect and indefeasible title to it, regardless of "by what bypaths and indirect crook'd ways" the person handing it over to him may have come by it; and the name of that characteristic is *negotiability*.

Current coin of the realm is not merely a transferable but a *negotiable* chattel; the maxim *nemo det quod non habet* (which, as we have already seen on p. 111, applies to goods except in certain circumstances) does not apply to it; and it passes freely from one man to another without regard to any defect in the title of the party paying it, provided it be paid for valuable consideration to an innocent party. Bills of exchange and certain other documents are not merely assignable choses in action but negotiable instruments, and are free from the risk of 'equities' and the requirement of notice to the debtor—two characteristics which render the process of assignment inadequate for the mercantile purpose of a paper currency. Just as the requirements of business have modified, in the case of goods, the maxim *nemo det quod non habet*, e.g., by the rule of market overt and other rules (pp. 112–116), similarly the mercantile community has by its customs, now recognised by, and as a part of, the law, developed the negotiability of bills of exchange and certain other instruments.

A useful definition of a negotiable instrument was given by the late Judge Willis, Q.C., in a series of lectures delivered by him, as follows :—“ A negotiable “ instrument is one the property in which is acquired “ by every person who takes it *bonâ fide* and for value, “ provided that the instrument is *such and in that state* “ *that* the true owner could transfer the contract or “ engagement contained therein by simple delivery of “ the instrument.”

In order that the *bonâ fide* transferee for value should acquire a better title than the transferor, the instrument must (a) belong to the category of negotiable instruments, and (b) be in a state or condition of negotiability. Thus, a bill of exchange payable to order belongs to the category of negotiable instruments ; but it is not until it is indorsed by the payee for the time being that it is in a negotiable state.

The two main sources of the legal recognition of negotiability in the case of a given instrument are (1) the Law Merchant ; and (2) statute. The Law Merchant (see Vol. I., Introduction, pp. 35–36) for a long time stood outside the Common Law ; but, during the last three centuries (largely under the inspiration of the great Lord Mansfield, who was Chief Justice of the King’s Bench from 1756 to 1788), it has been woven into, and has become part of, the Common Law. And that the custom of merchants may still be active as a source of the Common Law, is strikingly illustrated by this question of negotiability.

In 1873 the Court of King’s Bench, in a case (*Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. 374) where the debentures of an English limited company expressed to be payable to ‘ bearer ’ had been bought for value in good faith from a thief, declined (erroneously as it appeared later) to admit these documents into the category of negotiable instruments, on the grounds that (1) “ it was not competent to the company to attach



“the incident of negotiability to such instruments  
 “contrary to the general law, and (2) that the custom  
 “to treat them as negotiable, being of recent origin  
 “and not the Law Merchant, made no difference, as  
 “such a custom, though general, could not attach an  
 “incident to a contract contrary to the general law.”  
 But the view that the recent origin of a custom amongst  
 merchants was fatal to its legal recognition was over-  
 ruled by the House of Lords in a later case ; and it is  
 now clear (*Bechuanaland Exploration Co. v. London*  
*Trading Bank* [1898] 2 Q. B. 658) that, as the result  
 of the custom to treat them as negotiable, the ‘bearer’  
 debentures of English limited companies are negotiable  
 instruments, and (from a later decision) that the courts  
 will take judicial notice of that custom and no longer  
 require evidence of it.

Similarly, the negotiability of the following instru-  
 ments has been established in our courts : Bank of  
 England notes in *Miller v. Race* (1791) 1 Burr. 452 ;  
 1 Smith’s Leading Cases ; Exchequer Bills in 1820 ;  
 Prussian Government bonds in 1824 ; bearer ‘scrip’  
 (*i.e.*, written promises to bearer to issue bonds upon  
 payment of all instalments due) of foreign Govern-  
 ments by the House of Lords in the case of *Goodwin*  
*v. Roberts* (1876) (L. R. 1 App. Ca. 476), and many  
 others.

Illustrations of statute as a source of negotiability  
 are found in 3 & 4 Anne (1704), c. 8, and 7 Anne  
 (1708), c. 25, which placed promissory notes upon the  
 same footing, as to negotiability and otherwise, as bills  
 of exchange ; and the negotiability of bills of exchange  
 themselves, though originally established by judicial  
 recognition of the custom of merchants, now rests,  
 together with that of promissory notes, upon the  
 codifying Bills of Exchange Act, 1882.

It may be convenient here to mention certain  
 mercantile documents which are not negotiable.



(i) *Bills of lading*, as we shall see later (pp.184–186), are not true negotiable instruments; although in some respects a transferee may be in a better position than the shipper of the goods. (ii) *Dock warrants, &c.* There is a group of documents issued in connection with the storage of goods after, or awaiting, transit, such as dock warrants, delivery orders, warehouseman's certificates, which are not true negotiable instruments, but upon which the Factors Acts, 1889, and the Sale of Goods Act, 1893, s. 25, have conferred certain characteristics of negotiability by treating them as documents of title. As a result of these enactments, a 'mercantile agent' (*i.e.*, a mercantile agent having in the customary course of his business authority to sell, or to consign goods for sale, or to buy goods, or to raise money on the security of goods, *e.g.*, factors, brokers, auctioneers) who is in possession of goods, or of documents of title to goods such as bills of lading, dock warrants, delivery orders, warehouseman's certificates, and similar documents, with the consent of the owner, is treated as having the authority of the buyer, in regard to sales, pledges, and other dispositions of the goods by him in the ordinary course of business to a buyer, pledgee, or other recipient of the goods from him taking in good faith and for value. In other words, in a transaction which is protected by these statutes, there is yet another exception from the general rule of the Common Law: *Nemo det quod non habet* (p. 111); and for this purpose a seller of goods remaining in possession of them, or of a document of title thereto, with the buyer's consent after the sale, or a buyer who, with the seller's consent obtains the goods or a document of title thereto before paying for them, is a 'mercantile agent' armed with this power. But, apart from these enactments and from trade usage, these documents are in no sense negotiable.

(2) **BILLS OF EXCHANGE**—*Definition and form.*—Although, as we have seen, bills of exchange were originally invented for the purpose of transmitting money from one country to another, they are now of general use in many different kinds of pecuniary transactions. A bill of exchange is defined by the Bills of Exchange Act, 1882, as “an unconditional  
“order in writing, addressed by one person to another,  
“signed by the person giving it, requiring the per-  
“son to whom it is addressed to pay on demand,  
“or at a fixed or determinable future time, a sum  
“certain in money, to, or to the order of, a specified  
“person or to bearer.”

A bill of exchange is frequently called a ‘draft’; the person who makes it is called the ‘drawer’; the person to whom it is addressed is called the ‘drawee,’ who, after acceptance by him, becomes the ‘acceptor’; and the person in whose favour it is made is called the ‘payee.’ But the drawer and the payee may be (and very commonly are) one and the same person.

Bills of exchange are either *inland* or *foreign*. An inland bill is one which is, or on the face of it purports to be, drawn and payable within the United Kingdom, or drawn within the United Kingdom upon some person resident within the United Kingdom, which for this purpose includes the islands of Man, Jersey, Guernsey, Alderney, and Sark, and the islands adjacent to any of them, being part of the King’s dominions. A foreign bill is any other bill; that is to say, a bill which is either drawn by a person residing abroad upon some person within the United Kingdom and made payable within the United Kingdom, or *vice versâ*, or which is both drawn and payable abroad. The differences between inland and foreign bills of exchange are now not so important as they were formerly; but attention will be drawn to some of them as they occur.

A common form of bill of exchange is as follows :

<p>“ £500</p> <p>“ Three months after date pay to E. F. or</p> <p>“ order the sum of Five hundred pounds</p> <p>“ for value received</p> <p>“ To C. D.</p>	<p>London, 1st January, 1922.</p> <p>“</p> <p>“</p> <p>“</p> <p>(signed) A. B.”</p>
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A. B. is the drawer ; C. D. the drawee ; and E. F. the payee. Variations of this form are :

- (i) “ pay to E. F. *or bearer*,” in which case E. F. can negotiate the bill without endorsing it ;
- (ii) “ pay to me *or my order*,” in which case A. B. is both drawer and payee ;
- (iii) “ three months *after sight*,” in which case the time begins to run from the date of the acceptance ;
- (iv) “ *on demand* pay to E. F. or order,” and, when this occurs, as it usually does, in the case of a bill of exchange drawn upon a banker by a customer, the document is called a ‘ cheque ’ (see pp. 145–158). The expression “ for value received,” or simply “ value received,” is not essential ; but is traditional.

*Capacity of parties.*—In the words of the Act, “ capacity to incur liability as a party to a bill is “ co-extensive with capacity to contract.” But the incapacity of a party to a bill, while making it unenforceable against him, does not invalidate it against other parties who have made themselves liable upon it. A corporation cannot incur liability upon a bill of exchange, unless such a power is expressly contained in, or can be implied from, the document by which it is incorporated ; but, in the case of a trading corporation, such a power is implied. The corporation may seal the bill with its corporate seal ; but more

usually, some duly authorised person makes, accepts, or endorses the bill on behalf of the corporation. And, in order that such a person should escape personal liability, it is essential that he should add words to his signature clearly indicating that he signs only as an agent on behalf of a principal. Thus, the mere addition of the word 'Director' has been held not to be enough to exclude personal liability.

An infant cannot be made liable upon a bill of exchange in any circumstances ; but he may be liable on the consideration for which he accepted the bill, *e.g.*, for necessities supplied to him.

*Consideration.*—A bill of exchange is an instrument which evidences or embodies a simple contract ; but the rule requiring valuable consideration for simple contracts is subject to several modifications in the case of bills of exchange.

(i) The Act, after providing that valuable consideration for a bill may consist of "any consideration "sufficient to support a simple contract," adds as an alternative : "any *antecedent* debt or liability" ; which, as we have seen, would not satisfy the rule, which we discussed (p. 22) in connection with *Lamp-leigh v. Brathwait*, that consideration must be contemporaneous with the promise which it supports.

(ii) Although in other cases of simple contract the party who sues thereon for the breach of contract is obliged to prove the consideration on which the promise was made, and, on failure of such proof will be defeated, yet no evidence of the consideration is, in the first instance, required from the holder of a bill of exchange. For he is in general called upon to prove nothing beyond the signature thereto of the party charged ; there being a presumption that every bill or note is given for a sufficient consideration. For, in the words of the Act, "every "party whose signature appears on a bill is *primâ*



“*facie* deemed to have become a party thereto for “*value*.” If, however, the bill were shown to have been given for an illegal consideration, or obtained by fraud or duress, the holder would be required to prove that, subsequent to the illegality, fraud, or duress, value had in good faith been given for it ; and, even then, he might be defeated by proof that he was himself a party to such illegality, fraud, or duress.

Although consideration for a bill or note is presumed *primâ facie*, yet the absence of consideration may be proved by any person who is sued upon it. But (iii) although, in the ordinary case of a simple contract, it would be fatal to the promisee’s right of action if the promisor were to prove that the consideration did not “ move from the promisee ” (pp. 22–23) ; yet in the case of a bill “ if there be a consideration for “ it, it does not matter from whom it moves ” (Judge Willis). It will not suffice for the party sued upon the bill to prove that he himself has received no consideration ; he must go further, and show that at no time since he became a party to the bill was value given. If this burden of proof is discharged, a party known as an ‘ accommodation party,’ that is, one who, in fact, receives no consideration for a bill, is not liable on the bill to any other party except a holder for value, *i.e.*, a person who has either himself given value for, or has taken the bill through some prior party who has given value for it.

*Acceptance* is “ the signification by the drawee of “ his assent to the order of the drawer.” It usually consists of the words : “ Accepted C. D.” written across the face of the bill by the drawee, C. D. ; but his mere signature on the bill is enough. Acceptance may take place even before the drawer has signed the bill, or even after the bill has become due. But the more usual course is that, after signature by the drawer, and before it becomes due, the bill is presented to the



drawee for his acceptance ; and the drawee will in general accept the bill, although (in certain cases) he may lawfully refuse to accept it—*e.g.*, where he owes nothing to the drawer, who therefore has no pretence of any right to draw upon him. An acceptance may be either general, that is, when the drawee assents without qualification to the order of the drawer, or qualified, that is, with some variation of the effect of the bill as drawn, for instance, “accepted, provided “the *Mauretania* arrives before the end of this month, “C. D.” ; or “accepted for £100 only, C. D.,” the bill being for £500 ; or “accepted payable in London, “and not elsewhere, C. D.” (an acceptance “payable “in London ” simply is treated as a general acceptance) ; or “accepted payable six months from date, C. D.” the bill being drawn for three months ; or, where there are several drawers, acceptances by some or more but not all are qualified acceptances.

The effect of a qualified acceptance is that the holder may refuse to take it, and may treat the bill as dishonoured by non-acceptance ; if, on the other hand, the holder is content to take it, any drawer or endorser who has not expressly or implicitly authorised the holder to do so, or does not subsequently assent to his doing so, is discharged from his liability on the bill.

*Negotiation.*—Either before or after acceptance, the person in whose hands the bill may be, may wish to negotiate it ; for instance, the payee, rather than wait until the bill is due, may wish to realise at once the present value of the bill ; and, having found some person willing to give him the present value of the bill, that is, to ‘discount’ it for him, he proceeds to negotiate it to him, that is, to transfer it to him “in “such a manner as to constitute the transferee the “holder of the bill.” The manner of the transfer depends upon the form of the bill. If it is payable to bearer, it is negotiated by delivery simply ; if it is

payable to order, it is negotiated by the endorsement of the holder completed by delivery. The endorsement of a bill consists in writing one's name on the bill itself, usually on the back thereof; and such endorsement may be either 'in blank,' or else 'special' (sometimes called 'endorsement in full'). An endorsement is in blank if the payee simply writes his own name on the bill and specifies no endorsee; it is special if he writes "pay G. H.," or "pay G. H. or order," and signs his own name thereto. In either case, he delivers over the bill so endorsed. In the first case, the bill becomes payable to bearer, and passes freely from one person to another by mere delivery. In the second case, the endorsee G. H. (whether the words "or order" were added after his name or not) becomes in effect a new payee, and may in like manner endorse to another, and so on, *in infinitum*, until the bill is due, and even when it is overdue; but an overdue bill is no longer strictly negotiable. If the bill is payable simply to a person named, it is treated as payable to order, unless it contains words prohibiting transfer; in which last case it is not negotiable at all.

The process of negotiation of a bill which is not overdue carries with it, provided the elements of value and good faith are present, the peculiar attribute of negotiability; that is, as we have seen, that the transferee for value and in good faith, whether the transfer to him took the form of the simple delivery of a bill payable to bearer, or of the endorsement (either in blank or special) of a bill payable to order coupled with delivery, acquires a good title to the bill, notwithstanding any defect, of which he was unaware, in the title of the person who transferred it to him. Such a transferee is called a "holder in due course"; and the definition of that term contained in the Bills of Exchange Act, 1882, should be noted:—

(S. 29.) "A holder in due course is a holder who

“has taken a bill, complete and regular on the face of it, under the following conditions ; namely :—

“(a) that he became the holder of it before it was  
 “overdue, and without notice that it had  
 “been previously dishonoured, if such was  
 “the fact ;

“(b) that he took the bill in good faith and for  
 “value, and that, at the time the bill was  
 “negotiated to him, he had no notice of any  
 “defect in the title of the person who  
 “negotiated it” ;

(e.g., that his transferor had obtained it, or its acceptance, by fraud, duress, or other unlawful means, or for an illegal consideration). And a bill may be “complete and regular on the face of it,” notwithstanding that it has not yet been accepted.

*Date of payment.*—When the time arrives at which a bill becomes payable, it is said to be ‘due’ or ‘at maturity.’ If it is payable ‘on demand’ (an expression which includes ‘at sight’ and ‘on presentation’), then it must be paid as soon as payment is demanded ; and no days of grace are allowed. But in every other case, where the bill itself does not provide otherwise, three days of grace are allowed, and the bill is due and at maturity on the last of these three days. Although days of grace are not allowed on a bill payable ‘on demand,’ or ‘at sight,’ or ‘on presentation,’ yet they are allowed on a bill made payable so many days after demand, or sight, or presentation. If the last day of grace falls on a Sunday, Christmas Day, Good Friday, or any public fast day or thanksgiving day, the bill is considered to be due and payable on the last preceding business day. But if the last day of grace falls on a statutory Bank Holiday (other than Christmas Day or Good Friday), the bill is considered to be due and payable on the next succeeding business day ; as it

is also when the last day of grace is a Sunday, and the second day of grace is a statutory Bank Holiday.

*Presentment for acceptance* is only essential in the following cases : (i) when the bill is payable so many days 'after sight,' in order to fix its maturity ; (ii) when the bill expressly stipulates that it shall be presented for acceptance ; and (iii) when it is expressed to be payable elsewhere than at the drawee's residence or place of business. In no other case is presentment for acceptance necessary, in order to render liable any party to the bill ; but clearly the bill is a more valuable instrument, and easier to negotiate, if the drawee has made himself liable upon it by accepting it. The holder thus acquires another "string to his bow."

*Dishonour by non-acceptance.*—Although the drawee will in general accept the bill, yet it may be that, whether as between himself and the drawer he is bound or not to accept it, he will refuse acceptance ; and the law will imply such refusal on his part, if he does not accept immediately on presentment, or within the customary time, which is, in practice, twenty-four hours after the bill is left with him for acceptance. On such refusal, the holder of the bill becomes apprised, of course, that the bill is no bill at all, so far as the drawee is concerned ; and he is therefore entitled to charge the other parties, viz., the drawer and prior endorsers (if any), and to have recourse to them, as liable to pay immediately, though the bill has not yet arrived at maturity. But to justify any recourse against these parties, notice of dishonour by non-acceptance must be given to them, according to the same rules as those which regulate the giving of notice of dishonour by non-payment (p. 139) ; and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over against all prior parties.



The holder may, however, take his chance that the bill may, notwithstanding the refusal to accept, be ultimately paid by the drawee ; and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse against the other parties. For (except in the cases previously mentioned in which presentment for acceptance is obligatory) it is at the option of the holder whether he will present the bill for acceptance or not ; the object of such presentment being only to ascertain whether the bill is likely to be paid by the acceptor, and to strengthen its credit, if possible, by the additional security of the latter's name.

*Presentment for payment and dishonour by non-payment.*—After acceptance, any person, who, as payee, or by transfer (whether before or after acceptance), is the holder of the bill at its maturity, is entitled (subject to the days of grace where applicable) to immediate payment of the amount for which it is drawn. If under such circumstances the money be not then paid, the holder has a right to bring an action against the acceptor for the amount ; or he may (after presenting it to the acceptor for payment) have recourse to the drawer, and to every person whose name was on the bill, as endorser, when it came to the holder's hands. For each of these parties is a guarantor for the payment of the bill ; and it is on the credit of their names (though also on that of the acceptor, where it was negotiated after acceptance) that the holder is supposed to have taken the bill.

The right of the holder, however, to have recourse to the drawer and endorsers, is subject to these conditions—first, that he shall (except in certain cases) have *presented* the bill to the acceptor for payment, on the precise day when it became due, or, if payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a



reasonable time after endorsement, in order to render an endorser liable ; and, next, that he shall have given to the drawer, and to each endorser whom he wishes to hold liable, *notice of dishonour*, that is to say, notice that the bill has not been paid by the acceptor. This notice must, where the person giving it and the person to receive it reside in the same place, be given or sent off in time to reach the latter on the day following dishonour ; or, if they reside in different places, the notice must be sent off on the day following the dishonour, if there be a convenient post on that day, or, if there be no convenient post, then by the next post thereafter. Notice must be sent to all parties whom it is intended to charge, or at the least to him whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession ; each party being allowed, in turn, the same period of time for the purpose.

An endorser who is called upon and obliged to pay the bill, may in his turn have recourse to the drawer, or to any endorser prior to himself ; provided such party shall have had due notice of dishonour. And the same right attaches successively to each endorser, in his turn. But the original payee has, of course, no prior party to resort to but the drawer ; and the drawer can resort to no party but the acceptor, on whom, in general, the primary liability rests throughout. For the drawer, or any other party compelled to take up and pay the bill, is always entitled to look for satisfaction to the acceptor, other than an ‘accommodation acceptor’ (p. 133).

*Noting and protesting.*—When an inland bill has been dishonoured by non-acceptance or non-payment the holder may, if he think fit, employ a notary public to present the bill again formally to the drawee for acceptance or for payment (as the case may be). Thereupon, if the bill is again dishonoured, the notary

public makes a note upon it to that effect, adding the answer (if any) which he received from the drawee on presenting it, and initials his note. He is then said to have 'noted' the bill for non-acceptance or non-payment.

'Protesting' is an enlargement of 'noting,' and consists of a formal declaration in writing made by a notary public that the bill has been presented for acceptance or payment (as the case may be) and dishonoured, and that the holder intends to recover all the expenses to which he may be put in consequence thereof; and it contains the answer (if any) received from the drawee on presentation, and a copy of the bill, and is signed by the notary making it.

In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or endorsers; and when made, due notice of dishonour having been also given, the protest will entitle the holder to recover the amount of the bill, with interest, and all expenses, including the amount of the re-exchange, occasioned by returning it to the country where it was drawn, together with interest on such re-exchange. But in the case of an inland bill neither noting nor protesting is necessary to preserve the holder's rights of recourse against the drawer and the endorsers; nor is either of these ceremonies usual, except that, in the case of acceptance for honour *supra protest* and payment for honour *supra protest* (which are mentioned later), both inland and foreign bills must be protested. And it must be clearly understood, in the cases of both inland and of foreign bills, that noting or protesting does not dispense with the necessity of giving notice of dishonour to the parties entitled to receive it.

*Acceptance for honour supra protest.*—The general rule is, that it is only a drawee who can accept a bill. But there are two exceptions from this rule:—(i) the drawer or an endorser may insert in the bill the name

of a person to whom the holder may resort in case of need, that is, in case the bill is dishonoured by non-acceptance or by non-payment. Such a person is called a 'referee in case of need.' He may or may not step into the breach, according to his arrangements with the party nominating him or his desire to oblige that party; and the holder may or may not at his option resort to the 'referee in case of need'; (ii) a bill which has been dishonoured by non-acceptance by the drawee, and is not overdue, is sometimes 'accepted for honour *supra protest*' by a stranger to the bill, that is to say, for the honour of the drawer or (as the case may be) for the honour of an endorser. In these cases, some friend of the drawer or an endorser intervenes, with the consent of the holder, to prevent the bill from being sent back upon the drawer or endorser as unpaid, by placing his own name upon it as acceptor for the whole, or for part only, of the amount of the bill; after a protest has been drawn up declaratory of its dishonour by the drawee. Where an acceptance for honour does not express for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. An acceptance for honour *supra protest* operates, not as an absolute engagement to pay; but only as an engagement to pay in the event of the bill being presented to the drawee for payment on maturity, and dishonoured by non-payment and protested, and of its being afterwards duly presented for payment to the 'acceptor 'for honour,' with due notice of these facts. On these conditions being fulfilled, the acceptor for honour is then absolutely liable according to the tenor of his acceptance, as if he had accepted in the capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honour the acceptance was made; while, on the other hand, such an acceptor, upon being obliged to pay, is subrogated

to the rights and duties of the holder as regards the party for whose honour he paid, and all parties liable to that party.

*Payment for honour supra protest.*—Similarly, when a bill has been dishonoured by non-payment and protested, any person may intervene and pay it *supra protest* for the honour of any party liable thereon; the payment being accompanied by what is called a ‘notarial act of honour.’ The effect of a payment for honour *supra protest* is to discharge all parties subsequent to the party for whose honour it is paid; and the person paying for honour is subrogated to the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party. A holder who refuses to accept a payment for honour *supra protest* loses his right of recourse against any person who would have been discharged by such payment.

*Forged signatures.*—The general rule is that a signature which is forged on a bill, or which is placed thereon without the authority of the person whose signature it purports to be, is wholly inoperative; and no person, though acting in good faith, can acquire any rights thereunder. But to this rule there are certain exceptions. For :—

(i) the Act provides that when a bill payable to order on demand (including, of course, a cheque) is drawn upon a banker who pays the amount thereof in good faith and in the ordinary course of business, he is not liable to make good the amount so paid away, although it should be afterwards shown that the endorsement of the payee or any subsequent endorsement was forged or unauthorised;

(ii) the Act also provides, that when a bill of exchange or cheque is drawn payable to a fictitious or non-existent person, it is treated as payable to bearer; and a good title thereto will be acquired accordingly, although what purports to be the endorsement of that



fictitious or non-existent person is a forgery ; because, the bill being treated as payable to bearer, no endorsement is necessary to transfer it. A real person may be a fictitious person for the purpose of this provision ; where the drawer had no intention that the payee named should receive payment. Thus in a well-known case (*Vagliano v. Bank of England* [1891] A. C. 107), a clerk to a merchant prepared on a piece of paper what purported to be a bill of exchange, and, having forged upon it the signature of the pseudo-drawer and the endorsement of the pseudo-payee, managed by a fraud to induce the merchant to sign his acceptance upon it. It was then included in a list of genuine bills accepted by the merchant ; and the usual instructions were sent to his bank, the Bank of England, to pay the bills at maturity and debit the merchant's account. The clerk having presented the forged bill across the counter in due course, and having obtained payment of it, the Bank of England claimed that they were entitled to debit the merchant with the amount so paid ; and the House of Lords supported them in this claim (by five of the Law Lords), on the ground that the name of the pseudo-payee, though in fact an existing person, was 'inserted by way of pretence 'merely' and was therefore fictitious, so that the bill could be treated as payable to bearer and duly discharged by a payment to bearer, and also (by three of the Law Lords) on the ground that the merchant had misled the Bank, and was estopped from denying the authority of the Bank to pay the amount of the bill in the way it was paid ;

(iii) in some foreign countries, a good title may be obtained under a forged endorsement ; and the transfer of a bill so made in such a country, and held valid there, will be upheld in our courts ;

(iv) where a bill became due and was presented for payment, and the sum payable thereon was both



paid in good faith and received by the holder in good faith, it has been held that, if such an interval of time had elapsed that the position of the holder might have been altered, the money cannot be recovered from the holder by the person who paid it, although it may be subsequently proved that some of the endorsements on the bill are forgeries.

*Material alteration.*—We have seen (p. 72) that a material and intentional alteration of a written agreement by one party without the consent of the other, in general, has the effect of discharging it and making it unenforceable by the other party; but bills of exchange are to some extent excepted from this common law rule. For, by the Bills of Exchange Act, 1882, an alteration that is ‘not apparent,’ does not avoid a bill or note in the hands of a holder in due course; and such holder may avail himself of the bill as originally framed, as if it had not been altered, and enforce payment of it according to its original tenor. For instance, an alteration of the date, of the sum payable, or of the time or place of payment, is a material one. But, though this provision extends to promissory notes generally, yet it has been held that it has no application to Bank of England notes; so that even an alteration in the number of such a note renders it absolutely void (*Suffell v. Bank of England* (1881) 9 Q. B. D. 555).

*Waiver.*—A bill of exchange also differs from ordinary simple contracts in that the holder can, at or after its maturity, without receiving any consideration, and without executing a deed, validly discharge the parties liable upon it; either by a *renunciation*, which must be evidenced by writing, or by delivery up of the bill or note, or by an intentional *cancellation* apparent upon the bill or note.

## NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Chalmers' "*Bills of Exchange*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Goodwin v. Roberts* (1875) *L. R.* 10 *Ex.* 337 ; (1876) 1 *App. Ca.* 476.

*Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 *Q. B.* 658.

*Vagliano v. Bank of England* [1891] *A. C.* 107.

*North and South Wales Bank v. Macbeth* [1908] *A. C.* 137.

*Embiricos v. Anglo-Austrian Bank* [1905] 1 *K. B.* 677.

*Bills of Exchange Act, 1882.*]

## CHAPTER VIII.

PROMISSORY NOTES, CHEQUES, AND THE CONTRACT  
BETWEEN BANKER AND CUSTOMER.

PROMISSORY NOTES. *Definition and form.*—By the Bills of Exchange Act, 1882, a promissory note is defined as “an unconditional promise in writing made  
“by one person to another, signed by the maker,  
“engaging to pay on demand, or at a fixed or deter-  
“minable future time, a sum certain in money, to, or  
“to the order of, a specified person or to bearer.” A common form of a promissory note is as follows :

“ £500	London, 1st January, 1922.
“ Three months after date I promise to	
“ pay to E. F. or order the sum of Five	
“ hundred pounds	
	“ (signed) C. D.”

C. D. is called the ‘maker’ and E. F. the ‘payee.’ Common variations of this form are :

(i) “to pay to E. F. *or bearer*” ; (ii) “to pay *to my own order*” ; (iii) “to pay *on demand*.” A familiar instance of a promissory note payable on demand to bearer is a Bank of England note, which runs as follows :  
“Bank of England. Promise to pay the Bearer on  
“Demand the sum of Five Pounds. 1922, January 1,  
“London. For the Governor and Company of the Bank  
“of England (signed) Chief Cashier.”

*Rights and liabilities of the parties.*—Promissory notes were, by the statutes 3 & 4 Anne (1704), c. 8, and 7 Anne (1708), c. 25, placed upon the same footing, as to negotiability and otherwise, with inland bills of exchange ; and almost every point of law which applies to the one may be taken generally as applicable also to the other. There are, however, a few differences, most of which result from the difference in the nature of the two instruments. (i) As a note is originally made between but two parties, viz., the maker and the payee, there being no third party, or drawee, as in the case of a bill, all those legal incidents of a bill which regard the position of the drawee, and the nature and effect of an acceptance, are, of course inapplicable to a note. The maker of the note corresponds with the acceptor of a bill ; and the first endorser of a note corresponds with the drawer of an accepted bill payable to the order of the drawer. The maker is the party in every case primarily liable ; and to him, accordingly, the holder presents the note in the first instance for payment, when it arrives at maturity. On his failure to pay, the holder may then resort to the endorsers, each of whom has a successive right of recourse against the endorsers anterior to him ; leaving to the first endorser, or original payee, no remedy except against the maker himself.

(ii) Presentment for acceptance is in the nature of things inapplicable to a note. But, in order to render the endorser of a note liable, it must be duly presented to the maker for payment ; though, in order to render the maker liable, it need only be presented to him for payment when it is in the body of it made payable at a particular place.

(iii) A promissory note, if made payable at any particular place, must be presented there for payment, even though some restrictive words, *e.g.*, ‘and not elsewhere,’ should not have been added, as would be

necessary to constitute a local acceptance of a bill of exchange.

An 'I.O.U.' is not a promissory note, but may have other legal effects, for instance, by operating as an acknowledgment of a debt.

CHEQUES. BANKER AND CUSTOMER.—It remains for us to discuss that very familiar kind of bill of exchange called a 'cheque.' And, before doing so, we shall give a short outline of the contract between a banker and his customers; the public regulation of the business of banking and the exceptional position of the Bank of England having already been discussed in Vol. I, pp. 378–382. We shall continue to refer to the Bills of Exchange Act, 1882, as 'the Act.'

*Debtor and creditor.*—When a customer pays money into his account at his bank, he lends it to his banker. From this contract of loan of money there arises the relationship of debtor (the banker) and creditor (the customer); but, if the customer is allowed to overdraw his account (which he has no right to do in the absence of agreement), the position is reversed, and the banker becomes the creditor, and the customer the debtor. Adopting the terminology of the Roman law, the contract is *mutuum*, not *commodatum*; and the customer has no right to the return of the actual coins he paid in. And it is important to note, that the relationship is that of debtor and creditor, and not trustee and *cestui que trust*; and this is the case both of current and of deposit accounts. My bank owes me the amount standing to my credit; it is not a trustee of this amount for me. Accordingly, it results that both the right of a customer to recover from his banker a balance due to him, and the right of the banker to recover the amount of an overdraft, are respectively barred by the Statute of Limitations after the lapse of six years from the accrual of the cause of action;



whereas, if the banker were a trustee, the customer's right of recovery would not be subject to the Statutes of Limitation. The cause of action does not accrue to the customer, in the case of a current account, until he makes a demand upon his banker for payment of the money ; and so he may recover a credit balance upon an account which has lain dormant for more than six years (*Joachimson v. Swiss Banking Corporation* [1921] 3 K. B. 110). In the case of a deposit account, his cause of action accrues (it seems) upon the expiry of his notice of withdrawal, if a notice is required, or, if not, from the date of his demand for payment.

*The banker's liability.*—The duty of the banker is not merely to pay to the customer the money due to him when demanded by him, but to pay it, in accordance with his instructions, to persons nominated by him. Those instructions are embodied in bills of exchange drawn on the banker and payable on demand, which are called 'cheques' ; and the same instrument is customarily used when the customer wishes to draw out money from the bank for his own use, the payee in the cheque being in that case himself, whether mentioned by name or not, *e.g.*, 'Pay self or order' or 'or bearer.' When a banker pays the amount of a cheque presented to him for payment, he is said to 'honour' his customer's cheque ; and (apart from agreement) he is only bound to do this when he has sufficient funds in hand standing to the credit of the customer's account, and when the customer's cheques are drawn on the branch of the bank at which he has his account. When the customer pays in funds to meet a cheque drawn by him almost immediately before its presentment to the banker for payment, the latter is not liable for dishonouring the cheque unless a reasonable time has elapsed between the payment in of the funds and the presentment of the cheque. If a banker wrongfully dishonours his

customer's cheque when presented to him for payment by a third party, he may be liable to his customer in two ways : (i) *for breach of contract*, and the customer need prove no actual damage and can recover substantial damages to compensate him for the damage to his credit and financial reputation ; this case being an exception from the ordinary measure of damages for breach of contract (*Marzetti v. Williams* (1830) 1 B.& Ad. 415) ; (ii) (possibly) *in tort*, for he may have rendered himself liable for defamation, because it is usual for the banker when dishonouring the cheque to write upon it some letters or words such as 'R.D.' or 'Refer to 'drawer' (meaning 'I have got no funds available ; you 'must go back to the drawer, my customer.') There is a judicial conflict of opinion on the question whether these words are libellous or not. But, in any case, the customer cannot recover damages twice over, once on the contract and once for the tort ; and, in the exceptional case of this contract, the measure of damages recoverable on either cause of action would be the same.

Apart from agreement, a banker is under no duty to honour his customer's 'acceptances,' i.e., bills accepted by the customer ; though if a man accepts a bill 'payable at' his bank (a common practice), that is a sufficient authority to his banker to meet the bill when presented to him for payment.

The foregoing are the principal duties of the banker as a paying bank ; but, ordinarily, a banker also collects cheques upon other banks paid in by his customer, and he must exercise due care and diligence in doing so. If, through breach of that duty, the proceeds of a cheque paid in by a customer have not been credited to his account within a reasonable time, and the banker, thinking the account to be in debit when but for his negligence it would have been in credit, dishonours a cheque drawn by the customer, he will be liable to his customer in damages.

*No duty owed by banker to payee of cheque.*—The banker is not liable to the payee or subsequent holder of a cheque if he wrongfully dishonours it ; for there is no contract between them, nor is there that relationship which would give rise to a duty on the banker towards the payee or subsequent holder to exercise care. In one case, however, the banker may become directly liable to the payee or subsequent holder ; for, by section 74, sub.-s. 3, of the Act, if I send you a cheque on my banker having funds standing to my credit available to meet the cheque, and you fail to present the cheque to my banker within a reasonable time of its issue, and, before you present the cheque, my banker fails, whereby I suffer damage through your delay, my liability to you is discharged to the extent of such damage, and you become the creditor of my banker for that amount in lieu of me. Because, but for your delay, the balance due to me from my banker when he failed would have been less than it was.

*Revocation of banker's authority.*—The duty and authority of a banker to pay a cheque drawn on him by his customer are determined :

(i) (By section 75 of the Act) by *countermand by the customer of payment* ; but “there is no such thing as “a constructive countermand in a commercial transaction of this kind ” (per Lord Cozens-Hardy), and the analogy of the posting of an acceptance of an offer does not apply so as to make the posting of a letter or despatch of a telegram an effective countermand as at the time of posting or despatch. If a telegram countermanding payment arrives at a bank, and, through the negligence of the banker's staff, is not acted upon, it may be that he will be liable to his customer for damages for their negligence ; but it has been held that the customer cannot thereby establish, at any rate as at the time of the arrival of the telegram, an effective countermand by him of

payment. In more familiar language, countermand of payment is 'stopping the cheque'; and a person who finds that he has been defrauded into giving a cheque, or that a cheque drawn by him has been lost or mislaid, will commonly take this course.

(ii) *Notice of the customer's death*, by the same section of the Act, also determines the banker's duty and authority to pay his customer's cheques.

(iii) The effect of the customer's *lunacy* is not clear, but probably notice of the lunacy has the same effect as notice of his death.

To these causes of revocation, the Bankruptcy Act, 1914, s. 45, in effect, adds two more :

(iv) The fact that a *receiving order* has been made against the customer, whether the banker knows of it or not ; and

(v) the receipt by the banker of *notice of the presentation of a bankruptcy petition* against the customer.

(vi) The effect of the service upon the banker of a *garnishee order nisi* (pp. 541-542), which attaches for the benefit of a judgment creditor 'all debts owing or 'accruing' by the banker to his customer, the judgment debtor, is, that the banker may, and in order to be safe should, dishonour any cheques drawn by that customer which are subsequently presented for payment. This is so, even if the customer's credit balance would, after payment of his cheques, remain in excess of the judgment debt ; the reason usually given being that part of the customer's balance might consist of trust money (*Rogers v. Whiteley* [1892] A. C. 118). The appointment of a receiver of the customer's assets, made in proceedings to which the bank was not a party, has not the same effect, even if the bank has notice of it (*Giles v. Kruyer* [1921] 3 K. B. 23).

*Definition and form of a cheque.*—A cheque is defined by the Act as a "bill of exchange drawn on a banker "payable on demand." It usually takes the following



form; the usual 'crossings' being omitted and explained later:

No. X 2000.

London, 1st January, 1922.

C. D. TRADERS BANK, LIMITED.

Pay E. F. or order (*or* 'or bearer')

Five hundred pounds.

£500.—.—.

(*signed*) A. B.

A. B., the customer, is the drawer; C. D. Traders Bank, Limited, is the drawee; and E. F., the payee. A cheque being payable on demand, there is no occasion to obtain the banker's acceptance of it; the practice of having a cheque in certain cases 'certified' or 'marked good' by a banker bears a superficial resemblance to acceptance, but, according to the better opinion, does not have the same effects.

It is important to remember that a bill of exchange is an *unconditional* order to pay; because the introduction of conditional words into what purports to be a cheque has sometimes caused it to fail to comply with the definitions of a bill of exchange, and, accordingly, of a cheque, and thereby to lose for one or more of the parties the peculiar privileges with which the law has surrounded a cheque. For instance, a dividend warrant (which is usually in the form of a cheque) containing the words: "Provided receipt 'form at foot hereof is duly signed stamped and dated,'" was held not to be a cheque. But a dividend warrant containing the words: "This warrant must be signed 'by the person to whom it is payable, and presented for 'payment through a banker. It will not be honoured 'after three months of date of issue unless specially endorsed by the secretary,'" was nevertheless held to be a cheque (*Thairlwall v. G.W.R.* [1910] 2 K. B. 509).



With certain exceptions and additions, the provisions of the Bills of Exchange Act, 1882, applicable to bills payable on demand apply to a cheque; and the Bills of Exchange (Crossed Cheques) Act, 1906, applies only to cheques.

*Crossed Cheques.*—Except when giving a cheque to a payee who has no banking account and no facilities for collecting a cheque through a banker, or when for some other reason it is intended that the payee should receive cash for the cheque across the counter, most prudent persons ‘cross’ their cheques, with certain important consequences which must be noted. And not only the drawer but the payee or a subsequent holder may, and frequently does, ‘cross’ a cheque.

A ‘crossed cheque’ is one which bears on its face two parallel transverse lines, with or without the words ‘and company’ written between them, and with or without the words ‘not negotiable.’ A cheque simply so crossed is said to be ‘crossed generally’; but the name of some particular banker may also be added, in which case the cheque is said to be ‘crossed ‘specially.’ The most important consequences of crossing a cheque are as follows:—

(1) When a cheque is crossed generally, the banker on whom it is drawn must not pay it otherwise than to a banker, that is, must not hand out cash across the counter to the payee or subsequent holder; and, where it is crossed specially, the banker on whom it is drawn must pay it only to the particular banker to whom it is crossed, or to his agent for collection. If the banker on whom it is drawn ignores these rules, and pays the cheque otherwise than to a banker (or to the banker named in a special crossing), he does so at his own risk; for he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid, *e.g.*, if such a cheque is stolen, and paid over the counter

to the thief or a person to whom he has negotiated it (s. 79, sub-s. 2).

(2) Where a banker has, in good faith and without negligence, paid according to its tenor a cheque, crossed either generally or specially, both he and (if the cheque has come into the hands of the payee) the drawer will be in the same position as they would respectively have been in, if the amount of the cheque had been paid to the true owner thereof (s. 80). That is to say, neither of them can be sued on the cheque by the true owner.

(3) When a person takes a crossed cheque, bearing in addition the words 'not negotiable' upon it, he will not have, or be capable of giving, a better title to the cheque than that which the person from whom he took it had; the presence of these words negatives the characteristic of negotiability which would otherwise attach to the cheque (s. 81).

(4) When a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title or a defective title thereto, the banker incurs no liability to the true owner of the cheque by reason only of receiving such payment (s. 82); and, by the Bills of Exchange (Crossed Cheques) Act, 1906, a banker receives payment of a crossed cheque for a customer, even though he credits the customer's account with the amount of the cheque before receiving payment thereof; though there must be "some sort of account—either a deposit or a current account or some similar relation—to make a man a customer of a banker." But for these provisions, the collecting banker would be liable to the true owner of the cheque for damages for conversion.

The following set of facts will illustrate some of these provisions. Suppose that I owe you £50, and send you an order cheque for that sum crossed ' & Co.

‘Not Negotiable.’ You endorse it and one of your clerks steals it. Being unable to cash it at my bank across the counter because it is crossed (see (1) above), and having no banking account of his own, the thief must have recourse to some person who has a banking account. He transfers it to a tradesman to whom he owes more than £50, and the tradesman takes it in good faith, and, of course, for value. The tradesman pays it into his bank (the collecting bank) which, in good faith and without negligence, collects the amount of it from my bank (the paying bank). I and my bank are protected by (2) above; and I am probably protected for another reason. The collecting bank is protected by (4) above. The tradesman fails to get a good title, because the bill is not in a negotiable state (see (3) above); and the thief and the tradesman are liable to you (the true owner) for damages for the tort of wrongful conversion of your property.

But the words ‘not negotiable’ do not mean ‘not transferable.’ The cheque may still be transferred from one person to another (by simple delivery, if a bearer cheque, or by endorsement and delivery, if an order cheque); but each transferee will get no better title than his transferor had.

*Forged signatures.*—A banker is expected by law to know his own customer’s signature; and, in case of any reasonable doubt as to the authenticity of the signature, or otherwise as to the genuineness of the cheque, he is entitled to refer to his customer and enquire. The banker is entitled to a reasonable time for the purpose of making such an enquiry; and a cheque is not dishonoured in these circumstances merely because it is not paid at once. But it would be unreasonable to expect a banker to know the signatures of the payee and every subsequent holder of a cheque; and, accordingly, the Act protects the banker, and exempts him from the operation of the general rule (s. 24) that

a forged or unauthorised signature is wholly inoperative, by providing (s. 60) that when the banker pays a cheque (whether crossed or not) in good faith and in the ordinary course of business, he is deemed to have paid it in due course (and to be entitled to debit his customer with the amount), although the endorsements of the payee and any subsequent holder have been forged, or are unauthorised.

*'Account payee.'*—In recent years it has become common for customers, in addition to crossing their cheques 'and Co.' (with or without the words 'not negotiable'), to add the words 'account payee,' or 'a/c payee,' across the front of the cheque. The precise legal effect of these words has not yet been fully worked out by the Courts; but it seems clear that, at any rate, one effect is, to increase the degree of care which a collecting banker must exercise if he wishes to claim the protection of s. 82 of the Act, as having paid to the wrong person 'in good faith and 'without negligence' the amount of a crossed cheque. It seems probable that the words 'account payee' or 'a/c payee' do not restrict the negotiability of the cheque, but that they put a collecting banker upon some measures of enquiry as to the identity of the person paying it in, and as to the circumstances in which he comes to be paying in the cheque to his account if he is not, in fact, the payee.

*Customer's duty to show care in drawing cheques.*—We have seen that a banker is bound to know his customer's signature on a cheque. But a customer owes a duty to his banker in drawing a cheque to take reasonable and ordinary precautions against forgery, and must bear the loss, as between himself and his banker, if the amount of the cheque is increased as the result of the lack of those precautions, and the larger amount is paid by the banker. For instance, in *London Joint Stock Bank v. MacMillan and Arthur*

[1918] A. C. 777, a highly trusted clerk drew and handed to his employer, the banker's customer, for his signature, a bearer cheque in which the space provided for the amount to be written in words was left blank and the space provided for figures contained merely the figures £ 2 0. 0. written widely. The employer, being in a hurry, signed the cheque; the clerk interpolated the figure 1 before 2 and the figure 0 after 2, so that it read £120, and then inserted in the appropriate blank space the words "one hundred "and twenty pounds," which sum was paid to him in cash across the counter by the banker. It was held by the House of Lords that, on the ground of the customer's breach of duty to take care, the bank was entitled to debit him with £120, and not merely £2.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Chalmers' "*Bills of Exchange*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Marzetti v. Williams* (1830) 1 B. & Ad. 415.

*Thairlwall v. Great Western Railway* [1910] 2 K. B. 509.

*Curtice v. London City & Midland Bank* [1908] 1 K. B. 293.

*Rogers v. Whiteley* [1892] A. C. 118.

*London Joint Stock Bank v. MacMillan* [1918] A. C. 777.

*Joachimson v. Swiss Banking Corporation* [1921] 3 K. B. 110.

*Bills of Exchange Acts, 1882 and 1906.*]



## CHAPTER IX.

## CONTRACTS INVOLVING BAILMENTS.

BAILMENT, which is derived from the French *bailler* (to deliver), is in its earlier and simpler legal meaning 'a delivery of goods on condition of return,' or, in its more modern meaning, a delivery of goods for some purpose to a person (called the 'bailee') upon a contract, express or implied, that, after the purpose has been fulfilled, the goods shall be re-delivered to the 'bailor,' or be otherwise dealt with according to his directions. For instance, the loan of a tennis racket to a friend, the deposit of a bag at a cloak-room, the consignment of coal by rail, the pawning of a watch, are bailments.

Bailment is in fact very much older than the notion of the simple contract, and had its own special remedies to protect it (actions of Detinue and Trover) at a time when the simple contract had no place in our legal system. It was not until our Judges developed, under the name of Assumpsit, the ordinary remedy of an action for damages for breach of a simple contract, and that remedy had established its superiority, in several directions which we cannot now explore, over the remedies available to the bailor, that bailments began to be drawn within the sphere of contract. A definite stage in that process is marked by the famous case of *Coggs v. Bernard* (1703) (2 Lord Raymond 909; 1 Smith's Leading Cases), in which it was recognised that from every bailment a promise to re-deliver the goods, or otherwise deal with them as directed

by the bailor, may be implied, and that the consideration for that promise is to be found in the detriment sustained by the promisee (the bailor) by his having, temporarily at any rate, parted with possession of the goods. Thus for over two centuries at least bailments have passed muster as contracts ; and it would be pedantic to deny them their proper place in the law of contract. At the same time, we prefer to speak of ‘ contracts involving ‘ bailments ’ than of the ‘ contract of bailment.’

In the case of *Coggs v. Bernard*, referred to above, Chief Justice Holt made an attempt to fit English bailments into a classification borrowed from Roman law. Although the result is not entirely satisfactory, yet, by reason of the importance of that case and of the reputation of Chief Justice Holt, the classification has made a very considerable impression upon our law. After stating it, we shall proceed to extract a few general principles common to all or most of the contracts which involve bailments, and then examine separately some of the more important of those contracts. Bailments, according to Chief Justice Holt’s classification, are as follows :

(1) *Depositum*, a bailment, without reward, of goods by one man to another to keep for the use of the bailor ; (2) *commodatum*, when goods that are useful are lent to a man *gratis* to be used by him and then restored to the bailor ; (3) *locatio rei*, when goods are lent by the bailor (*locator*) to the bailee (*conductor*) to be used by him for hire ; (4) *vadium*, that is, approximately, our pawn or pledge ; (5) *locatio operis faciendi*, when goods are delivered by the bailor to the bailee to be carried, or kept in safe custody, or have some work done upon them, for a reward paid by the bailor to the bailee ; and (6) *mandatum*, when goods are delivered by the bailor to the bailee to carry them or do something in regard to them *gratis*. Whatever may have been possible in Sir J. Holt’s time, it is not

easy now to adapt the English law of bailments to this classification.

(i) *General principles. Duties of bailee.*—A bailee is liable for the loss of or damage to the thing bailed, if caused by his negligence—that is, by his omission to take proper care of it; in the case of bailments from which the bailee derives no obvious benefit, his implied promise to exercise some degree of care is supported by the detriment incurred by the bailor in parting with the possession of the goods. But the degree of care required will vary according to the circumstances of the case. From *Coggs v. Bernard* it would appear that upon a bailment which is for the mutual benefit of bailor and bailee, the latter is liable for ordinary negligence, viz., for the omission of that degree of diligence which a man of common prudence takes of his own concerns; that upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible; and that, upon a bailment for the bailee's own exclusive benefit, he will be chargeable even for *slight* negligence. But these distinctions, founded upon the Roman law as then understood, have not been strictly followed in our courts; in particular, exception has been taken judicially to the term 'gross negligence,' on the ground that it is only "negligence with a vituperative epithet." But this criticism has in turn been judicially disapproved; and it is clear that the term has a value in denoting "the sort of negligence for which a "gratuitous bailee is responsible," i.e., something more than is necessary to render liable the bailee for reward. Even a gratuitous bailee will be liable for failure to take such care as a reasonably prudent owner would take of his own property, and to use the skill which he professes to have where his profession or occupation is such as to imply skill; and, if he is

in fact guilty of negligence, it will be no defence, that he was no less careful of the thing bailed to him than of his own property. But in no case is an ordinary bailee, without some negligence on the part of himself or of his servants, liable for theft or other casualty. In *Coggs v. Bernard*, Chief Justice Holt says: "He is not answerable if they are stole without "any fault in him"; but a recent decision of the Court of Appeal (*Coldman v. Hill* [1919] 1 K. B. 443) shows that the burden upon the bailee of proving that the loss occurred without his fault is not discharged by merely proving that the chattels were stolen without negligence on his part. He must go further, and prove affirmatively, that he could not by reasonable efforts have recovered the stolen chattels; so that, where an agister of cattle which were stolen without his default failed to notify the owner or the police of the theft within a reasonable time of his knowledge of it, he was held liable, being unable to prove affirmatively that, even if he had notified the theft, the cattle could not have been recovered. As we shall see later (pp. 172–175, 176–177), common innkeepers and common carriers are under a special liability in the matter of theft and other casualties.

(ii) *Duties of the bailor*.—A bailor is under some duty to his bailee; for example, if the bailment is of a chattel to be used by the bailee for some particular purpose, or dealt with in a particular way, the bailor, even when he obtains no benefit from the bailment, will be liable for an injury suffered by the bailee in so using or dealing with such chattel, if it results from a defect in the chattel known to the bailor, and not communicated by him to the bailee. Moreover, a bailor who derives a benefit from the contract, will be liable for damage caused to the bailee by any defect which is due to the bailor's negligence, or which might



have been discovered by him by the exercise of proper care. And there are cases in which a bailor has been held liable in these circumstances, even to one who was not a party to the contract of bailment ; provided that the injured person is one whom the bailor contemplated, or ought to have contemplated, as being likely to use the chattel (*White v. Steadman* [1913] 3 K. B. 340).

(iii) *The bailee's possession*.—It is of the essence of a bailment, that possession is transferred to the bailee ; and he is, therefore, as possessor, entitled (as well as the bailor in some cases) to maintain an action against such as injure or take away the chattel. And this is so, even in cases where the bailee is not responsible to the bailor for loss of or damage to the goods (*The Winkfield* [1902] P. 42). This right of action has often been explained on the ground that a 'special' or 'qualified' property is transferred along with the possession to the bailee. But, in reality, the right of the possessor to sue is nearly as old as that of the owner ; and it is probable that, at one time, it was only the bailee who could sue for loss of, or damage to, the chattel. But it should be noted, that a servant to whom goods are entrusted by his master, or who receives goods on behalf of his master, does not have possession but custody ; the possession being in the master.

(iv) *The bailee's lien*.—Certain bailees have also a right of lien, in respect of the goods committed to their charge ; the rule of law being, that every person to whom a chattel has been delivered for the purpose of improving it by bestowing his labour upon it, has a lien thereon, and may withhold such chattel from the owner (in the absence at least of any usage or special agreement to the contrary) until the owner has paid his proper charges in relation thereto. *Possessory liens*, of which this is an instance, are either



*particular* or *general*. A lien is particular (or, as it is sometimes called, 'special'), when the right of retention is limited to the specific thing to which the debt or claim relates, and out of which it arises. It is general, when the right of retention is not so limited, but may be exercised to enforce payment of a general balance of account due from the owner of the thing retained. A particular lien may arise by operation of law or be conferred by contract. A general lien is not favoured by the law, and can arise only from contract, which may be express, or implied from the previous course of dealings between the parties, or from the custom of a particular trade, which, however, may be so notorious as almost to amount to law.

The following are illustrations of particular liens which arise by operation of law. A carrier by land or by sea has a lien on the goods carried, for the cost of their carriage, and is entitled to refuse to deliver them until the cost of carriage is paid. An innkeeper has a lien on the luggage brought by a guest to the inn, for the cost of his board and lodging. An artificer, who repairs or otherwise bestows labour or skill upon a thing sent to him by its owner for the purpose, has a lien on it for the amount of the remuneration due to him for his work. It is said that the improvement of the thing in the hands of the bailee is essential to the existence of a particular lien; and so the keeper of a motor-garage has no lien in respect of the mere maintenance of a car in its existing condition.

A particular lien confers no right of sale at Common Law; but merely the right to retain the thing until payment of the debt in respect of which the lien is given. A right of sale may, however, be given in any case by express contract; and is given in some cases by statute. Thus, a shipowner may, under the Merchant Shipping Act, 1894, enforce his lien for

freight by warehousing and selling the goods carried : and an innkeeper has a power of sale under the Innkeepers Act, 1878.

The following are illustrations of *general liens* which exist by virtue of custom. A factor entrusted in the ordinary course of his business as a mercantile agent with the goods of another, for the purpose of selling them, has, in the absence of agreement to the contrary, a lien on them for a general balance of account due to him from his principal. A solicitor has a lien on the deeds and documents of his client for his professional charges. An insurance broker employed by a shipowner or merchant to obtain from underwriters a policy of insurance on a ship or on goods is, as a general rule, the only person liable to the underwriters for the premiums ; and he has a general lien on the policy for the premiums and his commission, and also for the amount of the general balance of his insurance account with the shipowner or merchant who employed him. A banker has, in the absence of express or implied agreement to the contrary, a general lien on all negotiable securities placed by a customer in his hands as banker, in respect of any balance due to him from his customer—as, for example, when the customer has overdrawn his current account ; and the banker may retain possession of such securities so long as a balance remains due to him. Stockbrokers have also a general lien on securities, placed in their possession by or on behalf of a customer in the ordinary course of their business, for any balance due from the customer on any Stock Exchange transactions between them. Generally speaking, neither particular nor general liens can be enforced against the claims of third parties, *i.e.*, persons other than those from whom the debt claimed is due. But there are a few exceptions, *e.g.*, in the case of common carriers, who are obliged to receive goods for carriage, and

innkeepers who are compelled to receive travellers and their luggage. And, generally, when a person being in possession of an article, though not the owner, has implied authority to make a contract for its repair or improvement, the workman's lien prevails both against the owner and the person contracting with him (*Green v. All Motors Limited* [1917] 1 K. B. 625).

We have already mentioned (p. 110) the lien of the unpaid seller of goods, which is a particular possessory lien, and may, in certain circumstances, be enforced by a re-sale of the goods. We should also mention here, merely in order to distinguish them, the *equitable lien* upon property, both movable and immovable, which is not necessarily dependent upon possession, and also the *maritime lien*, which arises in the case of claims in respect of damage by collision, for salvage, by master and seamen for wages, and in certain other cases, and continues to attach to the property subject to it (the ship and, sometimes, the cargo), notwithstanding any subsequent change of ownership, until the claim is satisfied (p. 621).

We shall now proceed to examine, very briefly, the following contracts connected with bailments: Deposit of Goods, Loan of Goods, Hire of Goods, Pawn, Innkeeper and Guest, and, in the next chapter, Carriage of Goods.

*Deposit of goods* occurs when one person (called the 'depositor') delivers goods to another person (called the 'depositee' or 'depository') to be kept in safe custody for the former, and in English law (unlike the Roman) may be either for, or without, a reward paid to the depositee. As we have seen (pp. 161–162), the presence or absence of a reward makes a difference in the degree of the depository's liability; the gratuitous depository being only bound to exercise such amount of care as a prudent man would use in regard to his

own property, but not being excused merely on proof that he lost his own goods in the same circumstances. On the other hand, the depositary for reward must, it is said, always show *ordinary* diligence in the care of the goods. But, in most cases, he receives the goods in the course of his trade or business, *e.g.*, a warehouseman, a livery stable keeper, and, being affected by the maxim: *Spondes peritiam artis*, must exercise the degree of care and skill which is to be expected of a person carrying on that trade or business. It will be noticed that Deposit comprises both Sir J. Holt's *depositum*, which is gratuitous deposit, and certain species of his *locatio operis faciendi*, for instance, storage by a warehouseman.

*Loan of goods* occurs when one person (called the 'lender') delivers goods to another person (called the 'borrower') to use for the borrower's benefit, without any reward paid to the lender, and to be restored *in specie* in due course. That is Sir J. Holt's *commodatum*; and, according to the opinion he expressed *obiter* in *Coggs v. Bernard*, "the borrower is "bound to the strictest care and diligence." But it is probable that the borrower's liability cannot now be placed so high, although it is reasonable that he should be held to account more strictly than a bailee who does not alone, or does not at all, benefit from the bailment. And the bailee must not use the goods lent to him except in the manner and for the purpose agreed between the parties. The *mutuum* of the Roman Law, the loan of money or fungible goods such as corn or wine, which are not to be returned *in specie* but only in the form of an equivalent quantity, does not involve a bailment. Loan of money is dealt with in a later chapter (pp. 256–260).

*Hire of goods* (Sir J. Holt's *locatio rei*) occurs when one person (called the 'letter') delivers goods to another (called the 'hirer') to use for the hirer's



benefit in return for a valuable consideration (called the 'hire'), and to be restored *in specie* in due course. The hirer must exercise an ordinary or reasonable degree of care over the goods, and must not use them, except in the manner and for the purpose agreed between the parties. The hirer of an animal must, in the absence of contrary agreement, feed it.

The subject of what are called 'hire-purchase agreements' must be mentioned here. These hybrid agreements are devices, which have become very popular in recent years, to facilitate the purchase of goods on credit, *e.g.*, furniture, pianos, sewing-machines, etc., by enabling the purchaser, or the person who, if all goes well, ultimately will become the purchaser when he has paid all the instalments, to enjoy the possession and the use of the goods; without, however, entirely exposing the unpaid vendor, or the owner who hopes eventually to become the vendor, to the risk of losing the goods, in favour of the purchaser's creditors or of transferees from the purchaser. How can this result be achieved? The real *crux* is whether the transaction is an agreement of mere hiring until something happens (*e.g.*, the exercise by the hirer of an option to buy), or an agreement to sell. Upon this test will depend (amongst others) the important question: Has the recipient of the goods 'agreed to buy' them within the meaning of the Sale of Goods Act, 1893, s. 25, so that, being in possession of them with the consent of the seller, he can make a valid sale, pledge, or other disposition of them to a person taking for value and in good faith? The reader is advised to compare *Lee v. Butler* [1893] 2 Q. B. 318, with *Helby v. Matthews* [1895] A. C. 471. If then the so-called hirer has entered into a binding obligation to buy, paying the price by instalments, though the property in the goods is not to vest in him until the payment of the last instalment, the trans-



action is an agreement to sell ; and the so-called hirer has 'agreed to buy' for the purposes of the Act. If, on the other hand, the so-called hirer has the option either to terminate the agreement and return the goods to the owner, or to buy them upon payment of the whole of a certain number of instalments, then the transaction is hire, unless and until the option to buy is exercised ; and, until then, the so-called hirer has not 'agreed to buy' and cannot validly pledge or otherwise dispose of the goods. The Law of Distress Amendment Act, 1908, excludes from the boon of protection which it confers against a landlord upon many owners of goods found on the tenant's premises, "goods comprised in a hire-purchase "agreement." But the Court of Appeal has held (*Rogers Eungblut and Co. v. Martin* [1911] 1 K. B. 19) that this exclusion applies only in the case of a hire-purchase agreement made *by the tenant* ; so that goods comprised in such an agreement made by his wife are protected.

*Pawn* (Sir J. Holt's *vadium*) is the delivery by one person (the 'pawnor' or 'pledgor' or 'debtor') of an article (sometimes called the 'pledge') to another (the 'pawnee' or 'pledgee' or 'creditor') to secure a loan of money or other debt due from the debtor to the creditor. Pawn passes the possession of the article to the pawnee (as does every bailment), and also a right to sell it in default of payment ; and it must be distinguished from *mortgage*, which passes the whole property in the article to the mortgagee or creditor, subject to a proviso for redemption, and may or may not, according to the arrangement between the parties, involve a transfer of possession, and from *lien*, which is merely a passive right of retention of goods until a debt is paid (except in the few cases where a power of sale has been annexed to it), and passes no property to the creditor. Upon failure to pay the debt at

the agreed time, or, in the absence of agreement, upon the expiry of a reasonable time after payment is demanded, the pawnee may sell the pledge, handing any surplus to the pawnor, or being entitled to sue him for any deficit; and upon payment of the debt the pawnee must restore the pledge. The pawnee must show *ordinary* diligence in regard to the pledge; if he does so and yet loses the pledge, “notwithstanding the loss, yet he shall resort to the pawnor for his debt.” As to his making use of it, Sir J. Holt tells us that, if it is such as will be the worse for using, *e.g.*, clothes, he must not use it. If it is not likely to suffer from use, *e.g.*, jewels, he may use them, but at his peril; for if they are stolen from him while in use by him, he is answerable, whereas if they were stolen without negligence on his part from a locked cabinet, he would not be answerable. If it is such as to put him to any charge, *e.g.*, a horse or a cow, he may use it in a reasonable manner, *e.g.*, milk the cow, and so recompense himself, ‘milk for meat’; indeed, not to milk a cow that was in milk would amount, it is believed, to a lack of the ordinary or reasonable diligence which a pawnee must show.

*Pawnbrokers.*—A “person who carries on the business “of taking goods and chattels in pawn” is called a “pawnbroker”; and the legislature has found it necessary, by the Pawnbrokers Act, 1872, to regulate that occupation, and impose certain special obligations and restrictions upon persons engaged in it. The Act applies only to pawns in respect of which the money lent does not exceed £10. The pawnbroker must keep and use certain prescribed books and documents; he must not take a pledge in pawn unless the pawnor (as the Act calls him) takes a pawn-ticket in respect of it; the pawnbroker’s profits and charges in respect of loans by him must not exceed the amounts

prescribed by the Act : pledges are made redeemable within a year and seven days of grace ; if not then redeemed, a pledge pawned for ten shillings or less becomes the pawnbroker's absolute property, while pledges for more than ten shillings continue to be redeemable until sold ; pledges pawned for more than ten shillings must be sold by public auction if the pawnbroker wishes to dispose of them, and he may then bid for and become the purchaser of them ; any surplus realised upon the sale of a pledge for more than ten shillings, over and above the amount of the loan and profit due in respect of it, can be recovered by the pawner from the pawnbroker within three years from the date of the sale. A pawnbroker may safely treat a person producing the pawn-ticket as the person entitled to redeem the pledge : in the case of fire causing loss or damage to a pledge, the pawnbroker is liable to pay to the pawner the value of the pledge, after deducting the amount of the loan and profit, such value to be the amount of the loan and profit, and twenty-five per centum on the amount of the loan ; and the pawnbroker may insure to the extent of the value so estimated. In the event of a pledge being damaged or depreciated through the default, neglect, or wilful misbehaviour of the pawnbroker, a court of summary jurisdiction may award satisfaction to the pledgor. The Act also contains provisions for the punishment of a number of offences when committed by pawners or pawnbrokers, and for the licensing of pawnbrokers, and permits a pawnbroker, in the case of loans above forty shillings and not exceeding £10, to make a special contract with a pawner subject to certain restrictions.

*Miscellaneous.*—In addition to the foregoing, there are various circumstances (mostly falling within *locatio operis faciendi*) in which goods are delivered to a man so that he may do something to them,

*e.g.*, clothes to a tailor to repair or to a laundress to wash, cattle to a farmer to agist, that is, to feed. In all these cases, the duty imposed by the law upon the bailee is of the middle sort, namely, that he should exercise ordinary or reasonable care in their preservation. But if goods in the possession of a bailee are, after a breach of contract by him (as, for instance, by failure to re-deliver them to the bailor), accidentally lost or damaged (as, for instance, by fire), without any negligence on the part of the bailee, the latter is liable to the bailor for the value of the goods; for the loss happened “whilst his wrongful act was in operation “and force,” and, but for it, the goods would not have then been on his premises (*Shaw v. Symmons* [1917] 1 K. B. 799).

*Innkeeper and guest.*—A ‘common innkeeper,’—which term includes in law the keeper of every tavern or house of public entertainment in which board and lodging for travellers are provided (but not a boarding-house keeper, nor a lodging-house keeper, nor a restaurant-keeper)—is held responsible by the Common Law for the goods and chattels and money brought by any traveller to his inn, in the capacity of guest there, in every case where they are either lost, damaged, or stolen, while in the inn or in some place treated as part of the inn. To this rule there was no exception permitted by the Common Law, except where it would have been obviously unjust to apply the rule; as, for example, where the goods were lost entirely through the act of God or of the King’s enemies, or the guest’s own negligence, or where they were stolen from his own person, or by his own servant or companion, or from a room which he occupied not as a guest but, for instance, for commercial purposes, to enable him to exhibit samples. It is essential, in order to impose upon the innkeeper this common law liability, that the guest should be a traveller, that is, not merely



settle down in the inn and live there ; but it is not essential that he should spend a night there, and the taking of a glass of beer or a meal is enough, if the other necessary conditions are present. However, by the Innkeepers' Liability Act, 1863, no innkeeper (as defined by the Act) is now liable to make good to a guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto, or any carriage—the liability as to which remains as at Common Law), to a greater amount than thirty pounds ; unless (i) the goods or property have been stolen, lost, or injured through the wilful act, or the default, or neglect, of the innkeeper or his servant, or (ii) they have been deposited expressly for safe custody with the innkeeper, in which event the innkeeper may require as a condition of his liability that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing it. To entitle the innkeeper to the benefit of the Act, it is required of him, that a copy of this provision shall be conspicuously exhibited in the hall or entrance to his inn.

A common innkeeper has no option as to the customer with whom he will deal ; being legally bound to receive and entertain every traveller who presents himself for that purpose, and who is ready to pay his expenses (in advance if so demanded), provided only there be sufficient room in the inn, and no impropriety of conduct, or other valid ground for personal objection, such as an infectious disease. But a guest who stays for so long a period as to lose the character of a traveller, loses also the benefit of the common law obligation upon the innkeeper to receive travellers ; and, upon receiving reasonable notice from his host, must terminate his stay.

An innkeeper is not entitled to detain the person



of his guest, or to strip off his clothes, in order to secure the payment of the charges which have been incurred. He has, however, a lien on any goods brought by the defaulting guest to the inn, even though they do not belong to the guest; but the lien does not extend to the goods of a third person sent to the inn, to the innkeeper's knowledge, for the temporary use of the guest, *e.g.*, a piano. By the Innkeepers Act, 1878, an innkeeper is empowered, by way of realising his lien, to sell by public auction (after an interval of six weeks, and having first inserted an advertisement of the intended sale in one London newspaper and one local newspaper) any goods, chattels, carriages, horses, wares, or merchandise deposited or left with him on his premises, in cases where the party depositing or leaving the same has become indebted to him for board or lodging, or for the keep of a horse or other animal left at livery. But any surplus of the proceeds of the sale is to be paid over to the owner.

As regards the safety of the guest's person, the law follows the general principles governing the liability of the occupier of premises towards persons who, by contract with him, have the right to enter and use the premises for a mutually contemplated purpose. The innkeeper is not an insurer of the personal safety of his guest. But, whether the strict common law relationship of innkeeper and guest exists or not, there is an implied warranty that the inn premises are as safe for the reception of guests and use by them as reasonable care and skill on the part of anyone (that is, not merely the innkeeper and his servants) can make them; provided that the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned in the construction, alteration, maintenance, or repair of the premises (*Maclean v.*

*Segar* [1917] 2 K. B. 325). And an innkeeper is also liable in the event of the negligence of himself or of his servants.

#### NOTE ON AUTHORITIES.

[For more detailed treatment of these subjects the student should refer to the notes to *Coggs v. Bernard*, and *Calye's Case*, in 1 *Smith's Leading Cases*.

The following are some of the chief sources and illustrations of the principles discussed :—

*Coggs v. Bernard* (1703) 2 *Lord Raymond* 909 ; 1 *Smith's Leading Cases*.

*Wilkinson v. Coverdale* (1793) 1 *Esp.* 75.

*The Winkfield* [1902] *P.* 42.

*Wilson v. Brett* (1843) 11 *M. & W.* 113.

*Turner v. Stallibrass* [1898] 1 *Q. B.* 56.

*Helby v. Matthews* [1895] *A. C.* 471.

*Attenborough v. Solomon* [1913] *A. C.* 76.

*Keene v. Thomas* [1905] 1 *K. B.* 136.

*Calye's Case* (1584) 8 *Rep.* 32 ; 1 *Smith's Leading Cases*.

*Medawar v. Grand Hotel Co.* [1891] 2 *Q. B.* 11.

*Ultzen v. Nichols* [1894] 1 *Q. B.* 92.

*Lamond v. Richard* [1897] 1 *Q. B.* 541.

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“ *Digest of English Civil Law*,” pp. 195–206 ; 244–248.]

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## CHAPTER X.

## CARRIAGE OF GOODS.

A PERSON who undertakes the carriage of goods is either a *private carrier* with the liabilities of a bailee for negligence, greater when he carries for reward than when he carries gratuitously, or a *common carrier*, that is, a person engaged in the transport of goods as a public employment, and subjected by the Common Law to a specially onerous degree of liability about to be described.

A *common carrier* is one who professes to carry from place to place for reward goods delivered to him for carriage by any person who chooses to employ him. He is looked upon by the Common Law as an insurer of the goods delivered to him to be carried; that is to say, he is answerable for every loss of or injury to such goods, not occasioned by the act of God, or the King's enemies, or the negligence of the consignor of the goods (*e.g.*, in packing or otherwise), or some inherent defect in the goods themselves (*vice propre*), or fair wear and tear. Thus, in *Blower v. Great Western Railway Co.* (1872) L. R. 7 C. P. 655, the defendants were held to be not liable for the death of a bullock being conveyed by them which escaped from its truck as the result of its own violent struggles, and was killed on the line. A common carrier is bound to receive, and without unreasonable delay to forward to their destination (being within the limits of his accustomed journeys), such goods of every applicant

who is ready to pay a reasonable price for their carriage; provided he has room for them in his conveyance, and the goods are of the kind he holds himself out as ready to carry. For a wrongful refusal to carry, a common carrier may be indicted; and the person tendering the goods to him for carriage has an action for damages against him.

A *private carrier* is one who does not satisfy the conditions stated above under which the law attaches the peculiarly onerous liability of a 'common carrier'; he is not an insurer of the safety of the goods being carried by him, but, as a bailee, is liable, in the absence of agreement to the contrary, only for loss of or damage to the goods resulting from lack of care or skill on the part of himself or of those for whom he is responsible, in regard either to the vehicle supplied or to the course of the carriage. And he is not, as the common carrier is, bound to carry the goods of every person who wishes to employ him. As to the carriage of passengers, it is sometimes said that there is no such person as a common carrier of passengers. But, as recent decisions have emphasised, it is more correct to say that, while a person or company publicly professing to carry passengers (*e.g.*, a tramway company or authority) is bound to accept and carry passengers who present themselves, in the same way as a common carrier of goods must accept goods, such person or company is not an insurer of the safety of those passengers, and is only liable for the results of negligence, as in the case above stated of the ordinary carrier of goods who does not satisfy the conditions of a common carrier. In this limited sense only are carriers of passengers common carriers.

*Carriers by land.*—It was formerly competent to a carrier of goods, by a public notice of the terms on which he would deal (as by a notice that he would not be

liable for goods beyond a certain value, unless booked as such, and paid for at a higher rate), to limit to a certain extent the measure of his liability. For upon proof, direct or presumptive, that such notice had come to the knowledge of the customer before the goods were sent, the law implied a special contract between the parties conformable to the terms of the notice. But the risk of abuse to which this practice was open caused certain important statutory provisions to be made regarding it.

The Carriers Act, 1830, provided, that no public notice shall limit or in anywise affect the liability of a common carrier by land, as existing at Common Law, for any goods in respect whereof he is not entitled to protection under the Act. But it proceeds to enact, that no common carrier by land shall be liable for any loss of, or injury to, gold or silver coin, jewellery, lace (not including machine-made lace), watches, clocks, bills, bank notes, glass, china, pictures, engravings, and a variety of other articles specified in the Act, being mostly articles of great value in small compass, when the aggregate value of the parcel delivered for carriage shall exceed ten pounds; unless, at the time of delivery, the value and nature of the contents shall have been declared, and such increased freight paid thereon, as by a legible notice affixed in the office of the carrier shall have been previously advertised to the public as the scale by which such articles will be charged for. If no such notice shall have been affixed, or increased charge demanded on the value being declared, or if the carrier refuses (on being paid the increased charge) to give a receipt acknowledging the parcel to be insured, or if loss or injury arises from the *felonious* act of a servant in the carrier's employ, then he is not entitled to the benefit of the statute, but remains liable as at Common Law. The Act contains also a proviso, that nothing contained



therein shall affect any special (*i.e.*, express) contract between the carrier and the customer, or shall protect any servant of the carrier from liability or loss occasioned by his own personal neglect or misconduct ; but such special contract cannot, of course, be set up by the carrier merely as the result, or in the form, of a public notice or declaration.

*Railway companies.*—Railway, canal, and navigation companies may, in contemplation of law, be either common carriers or private carriers, according to the circumstances of the case. As regards goods which they profess to carry for persons generally, they are, *primâ facie*, common carriers ; but as regards goods which they do not profess to carry and are not in the habit of carrying, or only carry subject to express stipulations limiting their liability, they are not common carriers. Whether they are common carriers or not, their liability is customarily governed and limited by such special contract as they are permitted to make within the provisions of the legislation controlling these companies (see Vol. I., pp. 558–559), and, in particular, those of the Railway and Canal Traffic Act, 1854. The general effect of these statutes (so far as this question of liability is concerned) may be stated as being to prevent such companies from entering into special contracts limiting their common law liability with respect to the receipt, forwarding, and delivery of goods, unless the conditions of the special contract are ‘just and ‘reasonable,’ and the contract is a written contract, signed by or on behalf of the consignor. The reasonableness of the conditions is determined by the judge, before whom the action comes to be tried, in which the special contract is raised as a defence by the company. Moreover, the Carriers Act, 1830, above mentioned, applies to railway companies.

*Railway passengers’ luggage.*—A railway company is usually treated as a common carrier in respect of

passengers' luggage. The question of the time at which the company's liability for the safety of a passenger's luggage begins was discussed in *Great Western Railway Co. v. Bunch* (1888) L.R. 13 App. Ca. 31. If he entrusts his luggage to a porter employed by the railway company and authorised to receive it, within a reasonable time before the starting of the train, then the company's liability usually begins when the porter receives the luggage. But, of course, the railway company is usually carrying, not only the luggage, but the passenger himself as well, and if he interfere with the luggage, he may himself be taken to have contributed to the loss of it; and when, *e.g.*, he takes it into the carriage with him, he may reasonably be deemed to have assumed the entire custody of it, and cannot in general hold the railway company responsible for its safety in the absence of negligence on their part. In such cases, the liability of the carrying company is very difficult to determine, being dependent on the particular facts in each case.

*Horses, cattle, and sheep.*—The Railway and Canal Traffic Act, 1854, also limits the liability of a railway or canal company to £50 in the case of loss of, or injury to, a horse, £15 per head in the case of cattle, and £2 per head in the case of sheep or pigs, unless a higher value is declared by the consignor, and an increased payment made, if demanded.

*Equality clauses.*—The same Act imposes upon such companies the duty of affording reasonable facilities for the receiving and forwarding and delivering of traffic, and prohibits them from giving undue preferences or advantages to any particular person. Aggrieved parties are entitled to lodge complaints before a body which is now the Railway and Canal Commission, consisting, in effect, of a Judge of the High Court and two other commissioners, and having

power to deal not only with complaints under the 'equality clauses' but with many other matters affecting railways; though much of its jurisdiction has now been transferred to the Railway Rates Tribunal, established by the Railways Act, 1921 (Vol. I., p. 556).

*Carriers by sea.*—The owner of a ship who satisfies the conditions of a common carrier discussed above, is, in contemplation of law, a common carrier; but in fact his liability rarely rests on the common law rule, but usually depends on a special contract created between the parties, by the bill of lading or charter-party which usually attends a shipment of goods, called a 'contract of affreightment.' Such contract is commonly framed so as to exempt the carrier by sea from loss or injury occasioned by the act of God or of the King's enemies, or by the perils of the sea, or by accidents of navigation, or by a great many other causes of loss or damage.

*Statutory limitation of ship-owner's liability.*—Before examining the contract of affreightment between the ship-owner and the merchant or other shipper of goods, it will be convenient to state briefly the extent to which the legislature has limited the liability of the ship-owner in respect of the persons and the goods being carried on his ship, and towards third parties to whom injury may be done by his ship. At Common Law, the ship-owner's liability for damage done by his ship as the result of the fault of his servants in charge of her was unlimited; but, by a series of statutes passed in the eighteenth, nineteenth, and twentieth centuries, and particularly the Merchant Shipping Act, 1894, the position is now very different, and may be summarised as follows. By virtue of s. 503 of that Act, provided the loss of life, personal injury, or damage to property has taken place without his actual fault or privity, the ship-owner, whether British or foreign,

is not liable in damages—(i) for loss of life or personal injury caused to any person on board the ship in fault, or any other vessel, beyond an amount representing £15 a ton for each ton of the ship's tonnage, and (ii) for any loss of, or damage to, any goods or property of any kind on land or on water, he is not liable beyond an amount representing £8 a ton. But the £8 a ton in respect of injury to property is not additional to the £15 a ton in respect of personal injury or death. £15 a ton is the maximum limit; and, in the absence of the ship-owner's actual fault or privity, claimants in respect of personal injury or death receive the first £7 a ton clear, and then rank *pari passu* together with claimants in respect of injury to property as regards the remaining £8 a ton. If there are no 'property' claimants, then the 'personal injury or 'death' claimants have the whole £15 available for the payment of their claims.

The limitation may be claimed by instituting proceedings for limitation of liability in the Admiralty Division, after liability has been admitted by the ship-owner or determined by the Court, or it may be claimed by way of defence or counter-claim in a damage action; but the latter course is seldom taken when liability is disputed. The ordinary mode of obtaining limitation of liability is for the ship-owner to bring an action calling upon all persons who have claims against him for damages to appear, and to ask for a decree limiting his liability to the statutory amount, which he must pay into court with interest from the date of the damage. In addition to the statutory amount paid into court, he is also, in general, liable for the costs of the limitation action, and of the proceedings properly brought by the claimants to recover their claims.

The principle of limitation of liability was further extended by the Merchant Shipping (Liability of



Shipowners) Act, 1898, to the owners or builders of any ship built at any place in His Majesty's Dominions, from the time of her launching until her registration. And, by the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, so far as concerns any damage to any vessel or any thing on board any vessel (but not for loss of life or personal injury), the owners of any dock or canal or harbour received a similar protection in respect of liability for damage incurred in that capacity; the limit of liability being £8 a ton upon the tonnage of the largest British registered ship which, at the time of the damage or within five years previous, has been within the area of such dock or canal or harbour. These enactments have been still further extended by the Merchant Shipping Act, 1906, s. 71, to protect any charterer, to whom a ship is demised, from unlimited liability for injury or damage caused by the master or crew, who become, during the operation of the charter-party, his servants and not the servants of the ship-owner. The privilege of limitation of liability extends to all collision-damage actions, whether in Admiralty or elsewhere, and to all ships, whatever their nationality, and to beneficial owners as well as to registered owners. And, by the Merchant Shipping Act, 1921, the privilege of limitation of liability is extended to the owners and hirers of certain lighters, barges, and similar craft, as defined by that Act.

By virtue of s. 502 of the Merchant Shipping Act, 1894, the owner of a British ship is not liable at all (i) for any loss or damage happening, without his actual fault or privity, to any goods on board his ship, by reason of fire on board the ship; or (ii) for the loss of any gold, silver, diamonds, watches, jewels, or precious stones on board his ship, by reason of robbery or embezzlement, where the true nature and value of the gold, silver, diamonds, etc., have not, at the



time of shipment, been declared in the bills of lading or in writing, by the owner or shipper.

It may be here observed, that there is no enactment (such as exists in various forms in the United States of America and in some of the self-governing Dominions) preventing a ship-owner from contracting with the owners of goods carried in his ship, that he shall not be liable for any loss or damage to the goods caused during transit by any perils expressly excepted in the contract of carriage. Consequently, it is the general practice of ship-owners to insert in their contracts of carriage 'exceptions clauses,' exempting them from any liability for loss or damage caused by perils specified in the clauses. The clauses may be, and often are, so framed as to exempt the ship-owner from liability to the cargo owners for damage caused by the negligence of the ship-owner's servants, and are sometimes so wide in their terms as to protect him from liability for the breach of his primary duty to provide a ship that is reasonably fit in all respects, at the commencement of the voyage, to carry safely the goods which he has undertaken to carry. The courts give effect to such clauses ; but only where their terms are so clearly expressed as to be free from ambiguity. At a conference at the Hague in the autumn of 1921, attended by ship-owners, merchants, insurers, bankers, and other persons interested, from most of the principal commercial countries, a set of rules known as the Hague Rules, 1921, was drawn up and agreed to by these various 'interests,' for insertion into all bills of lading issued after January 31, 1922. This agreement, if ratified at all widely, will result in some narrowing of the present wide scope of the exceptions clauses commonly inserted by ship-owners in bills of lading for their protection.

*Bills of lading and charter-parties.*—As stated above (p. 181), the contract of affreightment between the

ship-owner and the merchant or other shipper of goods is usually embodied in a document which is called, according to the nature of the contract it evidences, either a 'bill of lading' or a 'charter-party.' A charter-party is an instrument in writing (with or without seal), between a merchant or other shipper of goods and a ship-owner, for the hire of an entire vessel at a freight or reward agreed on, either for a particular voyage or voyages (a 'voyage charter') or for a specified period of time (a 'time charter'). Upon the execution of such an instrument, the ship is said to be 'chartered,' and the party by whom she is engaged is called the 'charterer.' But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance, for freight, by any particular vessel (other goods being at the same time conveyed in her for other owners), she is described, not as a chartered but as a 'general' ship; and, in this latter case, no charter-party is usually executed, but only a bill of lading, a document which rests for some of its efficacy upon the important provisions of the Bills of Lading Act, 1855. The ship-owner in the latter case is merely a carrier, and, in the absence of the agreement to the contrary which is customarily embodied in the bill of lading, would be subject to the ordinary law of carriers, except so far as his duties and liabilities are regulated by the Merchant Shipping Act, 1894, and other statutes.

A *bill of lading* fulfils three functions in law. (1) It is generally an acknowledgment of or receipt for the goods shipped under it on board a particular named vessel, though frequently a modern bill of lading will be found merely to acknowledge receipt 'for shipment,' on one of a number of vessels (*Ship Marlborough Hill v. Alex. Cowan & Sons* [1921] 1 A. C. 444); (2) it evidences the contract for carriage of the goods, and sets forth the terms and conditions by

which the parties to that contract are bound ; (it should, however, be noted that, even when a ship is chartered, the ship-owner frequently issues a bill of lading ; but in that case, although the bill of lading has certain other useful functions, the contract of affreightment, at any rate as between the ship-owner and charterer, is contained in the charter-party) ; and (3) it is a document of title to the goods, so that indorsement and delivery of it to a purchaser operate to transfer to him the ownership in the goods, as well as the contractual rights and liabilities in respect of them ; so much so, indeed, that the transfer of a bill of lading, to a person who takes it in good faith and for valuable consideration, is effectual to defeat an unpaid vendor's right of stoppage *in transitu*. Thus a bill of lading is sometimes said to be a negotiable instrument "as against stoppage *in transitu* only" ; but although, both in this and in certain other respects, an indorsee of a bill of lading may be in a better position than his indorser, yet a bill of lading must not be regarded as a negotiable instrument in the sense in which a bill of exchange is (*Cahn v. Pockett's Co.* [1898] 2 Q. B. 61).

A *charter-party* is commonly made between the owner or the master of the ship on the one part, and a merchant or other shipper of goods on the other, and purports to be an agreement, that the ship shall be employed in the conveyance of goods for a certain voyage, or for a certain period of time, at a certain amount of freight, calculated at so much per ton, or at so much per month during the voyage. It also usually engages : first, on the part of the ship-owner or master, that, being staunch, sound, and fitted for the voyage, the ship shall receive a full cargo on board, not exceeding what she can reasonably carry ; that the ship shall forthwith sail (wind and weather permitting) on the specified voyage ; and that the cargo shall be delivered (subject to certain preventing causes)

at the port of destination, to the charterer or his assignees, in as good order as it was received on board ; and second, on the part of the charterer, that he will supply a full cargo, and load and unload the goods within a certain number of days (usually called ' lay ' or ' running ' days), and pay freight, as agreed ; and that, if he detains the vessel beyond the running days, he will pay *demurrage*, that is, a certain amount *per diem* for a specified period while the ship is detained. After the expiry of such period, he will, independently of express agreement, be liable to pay damages for the detention.

In the performance of the contract of affreightment, it is the duty of the ship-owner and the master and crew to take good care of the cargo during the voyage ; and the ship-owner will be liable to make satisfaction for any damage resulting from negligence in this respect, or for the loss or non-delivery of any of the goods of which the cargo consists, unless occasioned by causes within the exceptions of the bill of lading or charter-party. These exceptions, as already stated (p. 184), are at present usually framed in very wide terms ; and, if the language used is sufficiently unambiguous, they may exclude not only the ship-owner's liability for the negligence of himself and of his master and crew, but even the warranty (which otherwise is implied) that the ship is sea-worthy and fit for the reception and carriage of the particular cargo in question.

When the goods arrive, the ship-owner or master is not bound to deliver them, unless there be some stipulation to that effect, except against payment of the freight ; for there is in general a lien on the goods for the freight, and the delivery and payment are considered in law as concurrent obligations. For this reason, if the cargo is not carried to its destination, even though the ship-owner or master is prevented from completing the voyage by accident for which he is not responsible, and the owner of the cargo



ultimately gets the benefit, in the absence of agreement the freight stipulated for is not payable, nor has the shipowner any implied right to claim freight *pro ratâ itineris* for the uncompleted voyage. And if the master voluntarily abandons the ship, and it is brought in by salvors, or if the master is compelled to sell part of the cargo at an intermediate port for necessary repairs, though it is sold for more than it would fetch if carried to its destination, or if it is sold at a port of distress, as being too much damaged for re-shipment, no freight is payable. But where the owner of the goods voluntarily accepts them at an intermediate port, and dispenses with the further carriage, he may in certain circumstances be held liable to pay the freight *pro ratâ itineris*.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Smith, "*Mercantile Law*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

- Nugent v. Smith* (1875) 1 C. P. D. 19 ; (1876) 1 C. P. D. 423.  
*Belfast Rope-work Co. Limited v. Bushell* [1918] 1 K. B. 210.  
*Blower v. Great Western Railway Co.* (1872) L. R. 7 C. P. 655.  
*Great Western Railway Co. v. Bunch* (1888) L. R. 13 App. Ca. 31.  
*Steers v. Midland Railway Co.* (1920) 36 T. L. R. 703.  
*Meux v. Great Eastern Railway Co.* [1895] 2 Q. B. 387.  
*Peek v. North Staffordshire Railway Co.* (1863) 10 H. L. C. 473.  
*Zunz v. South Eastern Railway Co.* (1869) L. R. 4 Q. B. 539.  
*Clarke v. West Ham Corporation* [1909] 2 K. B. 858.  
*Bamfield v. Goole and Sheffield Transport Co.* [1910] 2 K. B. 94.  
*Sewell v. Burdick* (1885) L. R. 10 App. Ca. 74.  
*Steel v. State Line SS. Co.* (1877) L. R. 3 App. Ca. 72.  
*Price v. Union Lighterage Co.* [1903] 1 K. B. 750 ; [1904] 1 K. B. 412.  
*Carriers Act*, 1830.  
*Railway and Canal Traffic Act*, 1854.  
*Bills of Lading Act*, 1855.  
*Merchant Shipping Acts*, 1894 to 1921.  
 "*Digest of English Civil Law*," pp. 249–261.]



## CHAPTER XI.

## THE CONTRACT OF INSURANCE.

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A POLICY of insurance is an instrument in writing by which one party (called the 'insurer'), in consideration of a premium, or series of premiums, engages to indemnify another (the 'insured' or 'assured') against a contingent loss, by making him a payment in compensation, if and when the event happens by which the loss accrues. The effect of such a contract is, obviously, to protect the assured from the hazard to which he would otherwise be exposed, and to throw that hazard upon the insurer, who, if he carries on an insurance business, by balancing the good against the bad, and by adjusting the premiums as the circumstances seem to require, may not only escape loss, but may even secure for himself considerable profit from the result. Moreover, associations and other companies and corporations have been established for carrying on the business of insurance on a large scale; and the risks of any particularly heavy insurance are usually distributed among a great number of insurers.

The losses most commonly insured against are those occasioned by the storms and perils of the sea, or by fire, or by death; which insurances are therefore called respectively marine insurances, fire insurances, and life insurances. But insurances may be, and at the present day very usually are, effected also against losses resulting from other causes, as from the risks of war, riots and civil commotions, wet

weather, liability to third parties incurred in driving motor vehicles, burglary, physical accident, illness and the like, or against claims which may be made against the assured as an employer, *e.g.*, under the Employers' Liability Act, 1880, or the Workmen's Compensation Acts.

Of these various kinds we propose to examine briefly marine, life, and fire insurance ; but, before proceeding to do so, it is both possible and convenient to deal with a few principles of universal, or nearly universal, application to the contract of insurance in all its forms.

(1) *Insurable interest*.—It is essential to a valid contract of insurance, that the assured should have an insurable interest in the event against which he insures. The interest need not be that of an owner ; but the assured must be in such a position that he might be damnified in a pecuniary sense by the happening of the event. Otherwise his insurance is a wager, and is void under the general provisions of the Gaming Act, 1845, and in many cases also under a statute aimed at wagering in some particular branch of insurance. The time at which the insurable interest must exist differs, as we shall see, in the various branches of insurance. In this requirement of an insurable interest lies the main distinction between insurance, which is an economic transaction, and gambling, which is (to some persons) a means of obtaining certain pleasurable sensations by associating oneself financially with the issue of an unknown or uncertain event. In insurance there already exists (or in some cases will exist before the risk is incurred) a pecuniary interest which you wish to protect ; in gambling (except in the case of a hedging bet) there is none until you thereby create it.

(2) *Duty of disclosure*.—Insurance is pre-eminently a contract *uberrimæ fidei* ; and the assured, in whose

exclusive knowledge most of the material facts usually are, must disclose to the insurer in negotiating the insurance every fact (apart from matters of common knowledge amongst insurers of the kind in question) which is unknown to the insurer and might influence his mind in deciding whether or not to enter into the insurance, and, if so, what premium he should demand. If he does not, the contract is voidable at the insurer's option, even if the non-disclosure is by mistake and with no fraudulent intention, and whether or not any loss or damage which actually occurs has any connection with the circumstance not disclosed. In the nature of things the duty of disclosure has greater force when applied to the assured than to the insurer ; but, in the leading case of *Carter v. Boehm* (1766) (3 Burr. 1905 ; 1 Smith's Leading Cases), Lord Mansfield, to whom the development of our insurance law owes so much, said : "The policy would equally "be void against the underwriter " (*i.e.*, the insurer) "if *he* concealed ; as if he insured a ship on her voyage "which he privately knew to be arrived ; and an "action would lie to recover the premium." And the mutuality of the duty of disclosure has been recognised, at any rate in the case of marine insurance, of which the Marine Insurance Act, 1906, s. 17, says that "if "the utmost good faith be not observed by either "party, the contract may be avoided by the other "party." And this duty of disclosure of material circumstances is additional to the rules regarding misrepresentation, innocent or fraudulent, applicable to contracts generally.

(3) *Indemnity*.—Insurance is, in the main, a contract of indemnity ; that is, the assured cannot recover a sum larger than will give him compensation commensurate with his loss. He must not profit by the happening of the event insured against. This principle, which comprises and goes beyond the

requirement of insurable interest, is subject to several qualifications and exceptions, some more apparent than real ; for instance, (i) every person is deemed to have an unlimited insurable interest in his own life, and husband and wife have each an unlimited insurable interest in the other's life ; (ii) every person has an unlimited interest in insuring his health and physical capacity against sickness or injury by accident ; (iii) 'valued' policies, which will be explained later in dealing with marine insurance, form an exception.

(4) *Subrogation*.—By the principle of subrogation (which we shall also have occasion to mention in connection with the contract of guarantee (p. 254), an insurer who has paid a claim for loss or damage *ipso facto* stands in the shoes of the assured ; and he may exercise any remedies available to the assured for the recoupment or reduction of his loss or damage, and recover any sums which the assured has recovered in the enforcement of those remedies, or might have recovered but for his neglect or for waiver or renunciation by him. This principle applies notably to marine and fire insurance, and also to various miscellaneous kinds of insurance, but not to the ordinary policy of life insurance. So, if a man is killed by the negligence of a railway company, and thereby a policy upon his life for £5000 becomes payable to his personal representatives for the benefit of his widow and children, the insurer has no remedy against the railway company ; and the company can be sued by or on behalf of the widow and children under the Fatal Accidents Act, 1846, and cannot claim that the £5000, or (by reason of the Fatal Accidents (Damages) Act, 1908) the acceleration of the receipt of that sum, should be taken into account in assessing the damages. For the contract of life insurance is not a contract of indemnity, at any rate in the case of an insurance by a man upon his own life. The effects of the Fatal Accidents Act,



1908, seems to be (though it is not quite certain that it has achieved its purpose) to assimilate the rule regarding damages in fatal accidents to that applicable to non-fatal cases. For a defendant whose negligence causes a non-fatal injury cannot plead in reduction of damages that the assured has already recovered compensation under a policy of insurance against injury by accident (*Bradburn v. G.W.R.* (1874) L. R. 10 Ex. 1).

(5) *Causa proxima*.—A reference, however brief, must be made to a principle which is implicit in the law of insurance: *causa proxima non remota spectatur*; that is, when, as so often is the case, a loss or damage is the result of a succession of causes, it is only recoverable from the insurer when its proximate cause is a peril insured against. This rule is easy to state but difficult to apply; and a lengthy exposition of it would be out of place. Thus, damages for injury to a house, without any ignition, resulting from an explosion of gunpowder half a mile away, were held to be not recoverable on a policy against fire; but damages for injury to a consignment of tobacco, caused, not by actual contact with sea water, but by the smell arising from hides on board the same ship which became putrid through contact with sea water, were deemed to be covered by a policy against perils of the sea.

(6) *Return of premium*.—An insurance premium may, in general, be recovered upon a failure of the consideration for which it was paid. So where a policy is void *ab initio*, or where the insurer elects to avoid a policy, from a cause not amounting to fraud or illegality on the part of the assured—as where, in a marine insurance, the ship, though believed to be seaworthy, turns out not to have been so, contrary to the implied warranty on that subject, or sails alone, contrary to an express warranty to sail with convoy, or where, in a policy of life assurance, the declaration upon the basis of which the policy is made is incorrect



but not designedly untrue—the insurer is bound, in every such case, to refund the premium ; for he was never legally in risk, and therefore cannot retain the consideration. And where the policy is voidable by the assured on account of the fraud of the insurer or his agent, the assured is entitled to recover the premium, even though the policy be illegal and void *ab initio*. But where, on the other hand, a policy is void *ab initio* for illegality without fraud on the part of the insurer or his agent, the assured cannot recover the premium ; the mutuality of the fault making no difference. For in this latter class of cases the maxim applies : *in pari delicto, potior est conditio possidentis*. Nor can the assured recover the premium where the policy is voidable by the insurer on the ground of the assured's fraud, and is in fact avoided by the insurer.

#### 1. MARINE INSURANCE.

Marine insurance is said to have been originally introduced into this country by the Lombards in the course of the thirteenth century. The business of marine insurance is commonly undertaken by individual traders or by companies incorporated by charter or private Act of Parliament, or registered under the Companies (Consolidation) Act, 1908. When undertaken by individual traders, it is usual for a considerable number of them to subscribe the instrument (or *policy*, as it is called) ; each engaging, on his own separate account, to indemnify the assured to the extent of a particular sum of money, being a proportion of the whole amount insured. Such persons are called, with reference to the method used of thus subscribing their names, *underwriters*. In London they belong, for the most part, to the corporation of Lloyd's (so called from one Edward Lloyd, the proprietor of a coffee-house in Tower Street in the seventeenth century, whereat ship-owners, merchants,

and underwriters used to meet for the purposes of business), which, for better protecting its members against avoidable losses, is enabled, with the sanction of the Board of Trade, to establish signal stations and signal houses, and to arrange for telegraphic communication therewith. But it is not the corporation of Lloyd's which undertakes insurance risks and enters into policies of insurance; that is done by the individual members of Lloyd's, acting usually in groups or 'syndicates,' which are not partnerships or companies but merely fortuitous aggregations of, say, five, ten, or more members represented in common by one *underwriting agent* having power to bind them each individually and separately upon contracts of insurance. These members are frequently referred to as 'names'; and their agent is said to 'write' for them. If, as is commonly the case, he also is a member of Lloyd's, then he will 'write' for himself too. In certain provincial cities individual underwriters, and occasionally underwriting partnerships, are also found.

The law relating to marine insurance, whether effected by companies or otherwise, is now codified in the Marine Insurance Act, 1906, which, with some modifications, enacts in statutory form the principles laid down by the courts, and embodies many of the provisions of the Marine Insurance Acts, 1745 and 1788, and the Policies of Marine Insurance Act, 1868, which are now repealed, so far as marine insurance is concerned.

A contract of marine insurance is defined by the Act as a contract whereby the insurer undertakes to indemnify the insured against marine losses; that is to say, the losses incident to marine adventure. Such a contract may include mixed sea and land risks. Every contract of marine insurance made by way of gaming or wagering is declared to be void; and a

contract of marine insurance is deemed to be a gaming or wagering contract (a) where the assured has not an insurable interest, and the contract is entered into with no expectancy of acquiring such an interest; or (b) where the policy contains such a term as "interest" "or no interest," "without further proof of interest" "than the policy itself," or "without benefit of salvage" "to the insurer." Gambling on loss by maritime perils is moreover made a criminal offence by the Marine Insurance (Gambling Policies) Act, 1909.

Subject to the provisions of the Act, every person has an insurable interest who is interested in a marine adventure, for instance, when he stands in such a legal or equitable relation to the adventure or any insurable property at risk therein, that he may benefit by the safety or due arrival of the property, or be prejudiced by its loss, damage, or detention; and the assured must be interested in the subject-matter insured at the time of the loss, though not necessarily when the insurance is effected. Insurance being, as we have seen (pp. 64-65), a contract *uberrimæ fidei*, the assured is required to disclose, before the contract is concluded (that is, usually, before the insurer initials the 'slip' which will be superseded later by a formal policy), every material circumstance which is known to the assured, including every circumstance which in the ordinary course of business ought to be known to him. A material circumstance is one "which" "would influence the judgment of a prudent insurer in" "fixing the premium or determining whether he will" "take the risk"; but circumstances which are known or presumed to be known to the insurer, or which diminish the risk, need not be communicated to him. If the assured fails to comply with this duty of disclosure, the insurer may avoid the contract.

*The broker.*—It is usual to effect a marine insurance (and also certain other kinds of insurance) through an

agent called an ‘insurance broker,’ who negotiates the contract with the insurer. This has the effect of enlarging the assured’s duty of disclosure by bringing within its scope material circumstances known to the broker, though unknown to his principal, the assured. By a judicially recognised custom in marine insurance, it is the broker, not the assured, who is liable to the insurer for payment of the premium.

*The policy.*—As regards form, the Act provides that no contract of marine insurance shall be admissible in evidence unless embodied in a policy in accordance with the Act; and such policy must specify (1) the name of the assured or his agent who effects the insurance, (2) the subject-matter and risk insured against, (3) the voyage or period of time covered by the insurance, (4) the sum or sums insured, (5) the name or names of the insurers. But the contract is deemed to be concluded as soon as the proposal of the assured is accepted by the insurer; whether the policy be then issued or not. And, for the purpose of showing the time of acceptance, the slip, covering note, or other customary preliminary memorandum, though unstamped, may be referred to. A marine policy must be signed by or on behalf of the insurer; but, in the case of a corporation, the corporate seal will be sufficient. Each subscription, unless the contrary be expressed, constitutes a distinct contract.

*Re-insurance.*—The law now recognises the practice of re-insurance (at one time prohibited), that is to say, a contract whereby an insurer seeks to relieve himself from a risk which he may have undertaken, by sharing it with some other insurer, a common form of clause giving effect to this arrangement being as follows:—“being a re-insurance subject to all clauses and conditions of the original policy and to pay as “may be paid thereon.” Or the re-insurance may be only in respect of part of the risks undertaken by



the original policy, *e.g.*, total loss only. And every insurer is deemed to have an insurable interest, and may re-insure in respect thereof.

*Double insurance.*—The contract of re-insurance must be distinguished from what is sometimes called double insurance; which occurs where two or more policies are effected by or on behalf of the insured on the same adventure and interest, either by inadvertence or for better security, and the sums assured exceed the indemnity allowed by the Act. In the case of double insurance, the amount of the actual loss is recoverable by the assured against any or either of the insurers; but, inasmuch as a marine insurance is a contract of indemnity only, the law will not allow the assured to recover anything beyond the amount of his loss. And therefore, if he obtains full indemnity upon any of his policies, he may not further proceed on the others; and he must in any case give credit for any sum already received by him under any other policy. If he has received any sum in excess of his loss, he is deemed to hold it in trust for the insurers according to their rights of contribution among themselves; for an insurer who has paid in excess of his own share is (like one of several co-sureties) entitled to contribution from the other insurers who have underwritten the same loss.

*Voyage and time policies.*—Marine policies are divided into 'voyage' and 'time' policies. Where the contract is to insure the subject-matter 'at and from' one place to another or others, the policy is called a 'voyage policy'; and where the contract is to insure the subject-matter for a definite period of time, the policy is called a 'time policy.' Time policies are usually effected in respect of ships, and are rare in the case of goods, to which voyage policies are more appropriate. A time policy, which is made for any time exceeding twelve months, is invalid; subject



to the provision permitting a 'continuation clause'—*i.e.*, a clause providing that if the vessel is at sea on the expiration of the period of insurance, the insurance shall continue until her arrival, or for a reasonable time thereafter not exceeding thirty days. A time policy on a ship usually makes provision for returning a proportion of the premium in respect of each month during which the ship may be laid up in port.

*Assignment of policy.*—A marine policy is assignable, unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss, by indorsement thereon or in other customary manner ; and no notice of assignment to, or consent by, the insurer is necessary. The assignee is entitled to sue upon it in his own name ; but the insurer is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected. An assured who has no interest cannot assign.

*Subject-matter and risks.*—The subject-matter insured is most usually the ship, or the cargo, or both ; though it is also a common practice to insure the freight which the vessel is about to earn, or the profits expected from the cargo, or indeed any pecuniary benefit endangered by the exposure of the ship or cargo to the perils insured against. The risks insured against are described in the time-honoured language of the Lloyd's policy, which has formed the model of marine insurance policies throughout the Empire, as follows :

"Touching the Adventures and Perils which we the  
 "Assurers are contented to bear and do take upon  
 "us in this Voyage, they are, of the Seas, Men-of-War,  
 "Fire, Enemies, Pirates, Rovers, Thieves, Jettisons,  
 "Letters of Mart and Counter-mart, Surprisals, Takings  
 "at Sea, Arrests, Restraints and Detainments of  
 "all Kings, Princes, and People, of what Nation,

“Condition, or quality soever, Barratry of the Master  
 “and Mariners. and of all other Perils, Losses, and  
 “Misfortunes that have or shall come to the Hurt,  
 “Detriment, or Damage of the said Goods and  
 “Merchandises and Ship &c. or any Part thereof.”

Upon these words, which through the lapse of some centuries have acquired a kind of sanctity, it may be said that it is the practice to add to, or subtract from, the risks thereby insured by inserting words elsewhere in the policy or affixing printed clauses to it, and particularly to define precisely the subject-matter insured. Amongst the most important of the terms used is “perils . . . of the seas,” which comprise all the dangers on the sea incident to navigation. Any reference to capture at sea and similar risks must be understood as being subject to the implied condition that no insurance effected against capture or destruction by His Majesty’s forces will be enforced in an English court. ‘Jettisons’ means the voluntary throwing overboard of goods or merchandise, to ease the ship in time of danger or distress; and ‘barratry’ is wilful wrongdoing or fraudulent conduct on the part of the master or mariners, to the prejudice of the ship-owner.

Against the agreed risks the insurers, in consideration of a premium, the receipt of which they usually acknowledge in the policy, severally engage to give their indemnity to the extent of a specified sum (called the ‘subscription’), in respect of the subject-matter mentioned in the policy. And even if the vessel should have been lost at the time when the policy is executed (such fact being then unknown to both parties), the insurance is, by the ordinary form of these contracts, still binding; it being the practice in English policies to insure ‘lost or not lost.’

*Deviation.*—In the absence of a ‘deviation clause’ (which is now usually attached to the policy

where appropriate), the voyage marked out or contemplated by the policy must be exactly pursued ; for the slightest deviation from it, and every delay in prosecuting it, without lawful excuse, such as the necessity of saving life or averting capture or other disaster, will render the insurance, whether of ship or cargo, ineffectual—and that whether the loss be occasioned by the deviation or not, and whether the ship resume her proper course or not before the loss happens.

*Sea-worthiness.*—Every voyage policy, too, is made under an implied warranty (which, according to modern usage, would more strictly be called an implied condition), that the ship shall, at the time of her setting out, be sea-worthy, that is, in a condition to perform the voyage. And if the case turns out to have been otherwise, the effect of this breach of warranty is that the policy is void, and the assured is not entitled to recover in the event of a loss, whether the loss have proceeded from the defects in her condition or from any other cause, and whether the insurance be upon the ship or upon the cargo ; though, in the latter case, the insurer will often pay the claim and thereupon acquire by subrogation the rights of the cargo-owner against the ship-owner under the contract of affreightment. In the case of a time policy, there is no such implied warranty ; but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness to which the assured is privy.

*Loss or damage.*—The assured is entitled to claim upon a policy of marine insurance, not only where he is able to give direct proof of loss, but where he can show circumstances from which a loss may reasonably be presumed—as that a sufficient time has elapsed for receiving intelligence of the vessel since her departure, and that none has been received ; for in such

circumstances an actual total loss may be presumed. But, where direct proof of the calamity is given, it may turn out that the loss is either a *total*, or a *partial*, loss; and a total loss may be either *actual* or *constructive*.

Total loss is said to be 'actual' where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof. 'Constructive' total loss in a simple form may be illustrated in this way. If I drop a sovereign into a well, I cannot be said to have actually lost it, as it is there, and could, by an adequate expenditure of money, be retrieved. But supposing that it would cost in wages and hire of plant two pounds to get it, then it is constructively, virtually, as a 'business proposition,' lost. More precisely, total loss is said to be 'constructive' where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred, *e.g.*, where the insured is deprived of the possession of his ship or goods, and it is unlikely that he can recover them, or the cost of recovering them would exceed their value when recovered, or, in case of damage to a ship, where she is so damaged that the cost of repairing the damage would exceed the value of the ship when repaired, or, in case of goods, where the cost of repairing the damage and forwarding the goods would exceed their value on arrival. In every case of constructive total loss, the assured may either (i) treat the loss as partial, or (ii) abandon the subject-matter to the insurer and treat the loss as an actual total loss. In the latter case, he must give to the underwriter 'notice of abandonment,' *i.e.*, notice of his offer to abandon the thing insured and to treat the circum-



stances as constituting an actual total loss. The insurer may then either (i) accept the notice and pay as on a total loss, taking over what remains of the thing insured, or (ii) refuse to accept it, or merely preserve silence, which means that he regards the loss as only partial and will resist a claim for a constructive total loss. But unless notice of abandonment be given within a reasonable time after intelligence of the circumstances is received, the loss will be treated as partial only; there are, however, a few exceptional cases in which it is not necessary for the assured to give notice of abandonment. And the effect of a valid abandonment is to entitle the insurer to take over the interest of the assured in what remains of the subject-matter, and all proprietary rights incidental thereto.

*Measure of indemnity.*—In this connection, it is necessary to explain the distinction between a ‘valued’ and an ‘unvalued’ policy. A *valued* policy is one which specifies the agreed value of the subject-matter insured. Subject to the provisions of the Act, and in the absence of fraud, the value fixed by the policy is, as between the parties, conclusive of the insurable value, whether the loss be total or partial, though it is not conclusive (in the absence of provision to the contrary) for the purpose of determining whether there has been a constructive total loss. An *unvalued* policy is one which does not specify the value of the subject-matter, but (subject to the limit of the sum insured) leaves the insurable value to be subsequently ascertained in accordance with the provisions of the Act.

The measure of indemnity for which the insurer of a marine risk is liable, is the sum which the assured can recover in respect of a loss; assuming him to be fully insured to the extent of the insurable value in the case of an unvalued policy, or to the extent of the fixed



value in the case of a valued policy. No insurer can be liable beyond the measure of indemnity ; but if his subscription is less than the measure of indemnity, he will be liable for such proportion of the measure of indemnity as his subscription bears to the insurable value or the fixed value, as the case may be. For instance, if a cargo of which the insurable or agreed value is £10,000, is insured by ten insurers, and is damaged to the extent of fifty per cent., each insurer must pay £500.

The measure of indemnity is ascertained in accordance with a series of rules contained in the Act ; among which it is only necessary here to mention (1) that in the case of damage to a ship, the measure of indemnity is the reasonable cost of repair, if and so far as the ship has been repaired, or the reasonable depreciation, if and so far as the damage remains unrepaired ; and (2) that, in the case of damage to cargo, where the whole or part of the goods has been damaged, the measure of indemnity is such proportion of the value fixed, or of the insurable value (as the case may be), as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

*Salvage charges.*—Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against, and also general average losses and contributions (so far as incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against), may be recovered by the assured from the insurer. Salvage charges mean charges recoverable under maritime law by a person who has voluntarily rendered services in the rescue of ship or cargo, independently of contract. Other expenses (though not falling within this definition, and sometimes called ‘suing and labours’ expenses’) properly incurred for the purpose of avert-

ing a peril insured against, may also be recovered upon the usual form of policy containing the 'sue and 'labour' clause.

*General average.*—A 'general average' loss is a loss caused by, or directly consequential on, a general average act. It includes a general average expenditure, as well as a general average sacrifice. There is a general average act, where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril, for the purpose of preserving the property imperilled in the common adventure, that is, for the general safety of ship, cargo, and freight; as where, in a storm, jettison is made of any goods, or sails or masts are cut away, *levandæ navis causâ*. Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested; and such contribution is called a *general average contribution*. In this way is an expenditure or a sacrifice for the general safety averaged or distributed over all the parties concerned, and, through them, if insured, over their respective insurers. Whether, in order to found this obligation to contribute, it is, or is not, essential that the ship should be eventually saved, and saved as a direct result of the general average act, are questions that have not yet been definitely settled for English courts. Cargo for which a claim is made must have been laden in a proper manner; for goods stowed upon the deck (unless where a special custom authorises deck stowage) are not the subject of general average. Nor are insurers, as a rule, liable for loss of goods carried on deck during a voyage by sea. But this rule seems inapplicable to river voyages.

The method of settling the contribution among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the

value of the property sacrificed bears to the entire value of the whole ship, cargo, and freight—such estimate being made according to the net value of the several articles, if there brought to sale—and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found. The mutual contributions are settled by the ‘statements’ of persons called *average adjusters*, who are not truly arbitrators or umpires between the parties, but who can, by their impartiality, command so high a degree of respect for their ‘statements,’ that they are likely to be accepted by the parties, unless there should arise an important question of principle calling for judicial determination.

The word ‘average’ comes from, or is connected with, the French word *avarie*, which means simply damage or loss. It occurs in another expression used in marine insurance, ‘particular average,’ where it means nothing more than partial loss or damage, and does not involve any notion of ‘averaging’ a loss over several interested parties.

## 2. LIFE INSURANCE.

A life policy (that is, a policy on human life) usually engages, that, in consideration of a single premium or a number of periodical premiums, the insurer (who is almost invariably an insurance company) will pay, on the death of some individual, or on his death within a limited period, a certain sum of money therein specified; that is, will pay it to the person effecting the insurance, supposing it to be effected by a stranger having an interest in the life insured, or to the executors or administrators of the person whose life is insured, supposing him to effect it for his own benefit. And in the case of endowment or annuity policies the sum insured is often payable to the person insuring his own life. Life insurance

in many of its forms combines with insurance the means of an investment of money.

*Insurable interest.*—The Life Assurance Act, 1774, makes it essential to the validity of a policy of life insurance, that the assured should have an insurable interest in the life which he insures ; otherwise the policy is void. But in the case of life insurance, the operation of the rule requiring the existence of an insurable interest is very substantially qualified by the fact that a contract of life insurance is not a contract of indemnity ; so that, provided the assured has an insurable interest at the time the insurance is effected, the value of that interest can be recovered on the occurrence of the death, even though meanwhile the interest should have ceased. Thus, a person has always been considered as having an interest in his own life (though not in that of his parent or child), of a kind that justifies his effecting an insurance upon it to any amount. And a married woman has a similar interest in the life of her husband, and a husband in the life of his wife ; while a policy effected on the life of one's debtor is valid to the extent of the amount of the debt owing at the time when the insurance is effected. And, even though the debt be paid off before the debtor's death, that amount can nevertheless be recovered on the policy.

*Assignment.*—By the Policies of Assurance Act, 1867, a life policy is (apart from any provision in the policy to the contrary) assignable without the consent of the insurer, provided that notice in writing is sent to him ; and the assignee is entitled to sue the insurer in his own name, but is subject to any defences which the insurer might have raised against the party effecting the insurance. It is not necessary that the assignee should have any insurable interest ; and life policies are freely sold in the open market, often by auction. (Thus, in the year 1915, a policy for



£155,000 upon the life of “an officer, aged forty-four years, serving with the Territorial Forces and liable, “of course, to foreign service,” there being no liability to pay any increased premium in the event of foreign service, was sold by auction in the City of London—see *Times Newspaper*, March 5, 1915.)

*Matrimonial policies.*—Under the Married Women’s Property Act, 1882, a husband may insure his own life expressly by way of trust for the benefit of his wife and children, and (subject thereto) for his own benefit ; also, a wife may effect a policy either on her own life or on that of her husband, for her own benefit, or that of her husband or her children. In such cases of policies made for the benefit of others than the assured, the policy moneys do not, so long as any object of the trust remains unperformed, form part of the assured’s estate, or become subject to his or her debts.

*Suicide, capital punishment, and murder.*—Life policies usually contain a special clause making provision for suicide. To permit the personal representatives of a person insuring his own life to recover upon the policy in the event of his suicide, would be contrary to public policy ; on the other hand, the presence of a severe suicide clause impairs the value of a policy as a marketable commodity or as security for a debt. Apart from any special clause, the effect of the suicide of a person insuring his own life is as follows : (i) if committed while insane, his personal representatives can recover ; (ii) if while sane, they cannot ; (iii) in either case, the assignee of the policy for value is in the same position as the deceased’s personal representatives would be. But a clause protecting such an assignee, and enabling him to recover in either of these events, is both lawful and common. The personal representatives of a person who dies by sentence of law cannot recover upon a policy effected by him on his own life ; but the murder of a person whose life is insured, does not prevent the



person entitled to the policy from recovering upon it, unless he is the murderer.

*Insurances upon the lives of children* by their parents to cover funeral expenses have given rise to grave abuses, and are the subject of regulation by a number of statutes, of which the Friendly Societies Act, 1896, ss. 62-67, 84, the Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13, the Children Act, 1908, s. 7, and the Assurance Companies Act, 1909, s. 36, may be mentioned.

*Payment into court.*—Under the Life Assurance Companies (Payment into Court) Act, 1896, a life insurance company can pay policy moneys into court, “if in the opinion of the board of directors no sufficient discharge can otherwise be obtained.”

### 3. FIRE AND MISCELLANEOUS INSURANCE.

Fire insurance, and the many other kinds of insurance which the enterprise of the mercantile community is continually devising, in the main, resemble marine insurance in being contracts of indemnity, and differ from life and physical accident and sickness insurance. Attention may be drawn to five points upon fire insurance.

(1) *Premises contracted to be sold.*—The operation of the principle of subrogation sometimes produces, in the case of an insurance against fire of premises which are the subject of a contract of sale, results unexpected by the parties. For instance, a vendor, whose premises are insured, signs a contract to sell them; but the policy is not assigned to the purchaser. Before the execution of the conveyance, they are burnt to the ground; the vendor remains nevertheless entitled to receive the purchase-money, but the purchaser is not entitled to the benefit of the insurance. If the vendor first receives the purchase-money, he cannot recover from the insurer, because fire insurance is a

contract of indemnity and he has sustained no loss ; if, on the other hand, he first receives the insurance moneys, the insurer is subrogated to his rights under the contract of sale, and can obtain the purchase-money from the purchaser. The moral is, that the purchaser, to whom the equitable property in the premises passes upon the signing of the contract of sale, must take steps to protect himself either (i) by effecting a temporary insurance upon the premises pending the completion of the purchase and the assignment of the policy, or (ii) by arranging with the insurer (with the vendor's concurrence) to regard him as jointly interested with the vendor, and to hold him (the purchaser) covered pending the completion, when the policy will be assigned with the insurer's consent. It is clearly unsafe for the vendor to assign the policy to the purchaser at the time of signing the contract of sale ; for that course would leave the vendor with only a personal remedy against the purchaser in the event of the premises being destroyed before payment of the purchase-money.

(2) *The average clause*.—If I insure for £10,000 a warehouse worth £50,000, and it is totally destroyed by fire, I should be entitled to recover from my insurer £10,000 unless my policy contained (as it almost certainly would) an 'average' clause, whereby the assured can only recover the proportion of his loss which the amount for which he has insured bears to the value. The practice of inserting this clause in fire insurance policies thus encourages insurers to insure the full value of their property. The clause is not necessary in marine insurance policies ; because the ordinary operation of the law (now codified in the Marine Insurance Act, 1906, s. 81) produces the same result as the clause secures for a fire policy.

(3) *Fires Prevention (Metropolis) Act, 1774, s. 83*.—This statutory provision (which, it has been decided,

is of general application throughout England and Wales) enables “any person or persons interested in “or entitled unto any house or houses or other “buildings” destroyed or damaged by fire, to compel the insurer to expend the insurance moneys in the reinstatement of the premises. Under this section, a mortgagee has been allowed to insist upon the insurance moneys being expended in rebuilding the insured premises, and thus to defeat a judgment creditor of the mortgagor who had obtained a garnishee order *nisi* attaching the moneys. And the Conveyancing Act, 1881, s. 23, sub-s. 4, gives power to a mortgagee to compel his mortgagor to expend insurance moneys in re-building the mortgaged premises.

(4) *The insurable interest* must exist both when a fire insurance is effected and when the loss or damage occurs.

(5) *No assignability*.—Unlike the cases of marine and life insurance, no statutory or other provision exists for the assignment of a fire policy without the consent of the insurer. If the latter refuses to give his consent, and to accept the proposed assignee as the party insured, any purported assignment is abortive.

*Miscellaneous*.—By the Assurance Companies Act, 1909, certain provisions are made for securing the solvency of insurance societies; in particular, by requiring every life insurance company and newly established fire, accident, employers’ liability, or bond investment insurance companies (with certain exceptions) to deposit in court a sum of £20,000. By the Companies (Consolidation) Act, 1908, s. 108, every insurance company is bound to publish twice a year a full statement of its capital, and of its assets and liabilities.

## NOTE ON AUTHORITIES.

[The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Carter v. Boehm* (1766) 3 Burr. 1905 ; 1 *Smith's Leading Cases*.  
*London Assurance v. Mansel* (1879) 11 Ch. D. 363.

*Dalby v. India and London Life Co.* (1854) 15 C. B. 365 ;  
 2 *Smith's Leading Cases*.

*Hebdon v. West* (1862) 3 B. & S. 579.

*Castellain v. Preston* (1883) 11 Q. B. D. 380.

*Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558.

*Griffiths v. Fleming* [1909] 1 K. B. 805.

*Marine Insurance Act*, 1906.

*Life Assurance Act*, 1774.

“ *Digest of English Civil Law*,” pp. 303–308.]

## CHAPTER XII.

## THE CONTRACT OF SERVICE.

UNDER the term 'employment' it is convenient to include (i) the contract of *agency*, which we have dealt with in an earlier chapter (V.), the work which the agent is employed to do being the making of contracts between his principal and third persons; (ii) the contract of *service* (including apprenticeship); and (iii) the contract of *work and labour*, where work is done by a person who is neither an agent nor a servant nor an apprentice.

*Contracts of service* may be considered under the following headings :

- (1) the general principles of the contract ;
- (2) some particular classes of servants ;
- (3) the master's liability to the servant for injuries sustained by him ;
- (4) the master's responsibility to third persons for injuries done to them by the servant ;
- (5) the master's rights against third persons in respect of injuries done to the servant by them, and of interference with the service.

The subject-matter of headings (3), (4), and (5) will be more conveniently treated of in connection with the Law of Torts, and will therefore be postponed to a later portion of this volume.

## 1. GENERAL PRINCIPLES.

The contract of service arises when one person (the servant) contracts with another (the master) to work



for him and subject to his orders and control, in return for a remuneration.

An essential feature of this contract is that while the character of the work to be done, *e.g.*, domestic, labouring, clerical, managerial, is usually ascertained expressly or by implication by the agreement of the parties, the manner of the doing of it is subject to the order and control of the master; whereas the element of a master's order and control is absent from the contract of work and labour, or at any rate very much in the background, and the employee is an "independent contractor" who has "undertaken to produce "a given result." This distinction is of cardinal importance in considering an employer's responsibility to third persons for injuries sustained by them at the hands of his employee.

Before considering the principal classes of servants and the peculiar incidents attaching to their service, a few general remarks may be made.

*Servile incidents.*—Whatever term may be appropriate to describe the personal condition of the majority of the villeins in our early manorial system, it has now for some time past, and notably since Lord Mansfield's judgment in the case of the negro *Somerset* in 1771 (11 State Trials, 340), been a principle of the Common Law, that slavery cannot exist in England. Nor, by statute, can it occur in any part of the British Empire; though in certain places within the Empire systems of indentured labour are in force which confer on the employer extensive powers of control and discipline while the service lasts. In England, the decided cases show a strong tradition *in favorem libertatis*; and it is not competent to the parties to attach to a contract of service, or to any other contract, any servile incidents, such as unlimited rights of personal control and correction. So, in a recent case, the Court of Appeal refused, on the ground of public policy, to enforce an

oppressive contract made between a money-lender and a borrower, whereby the latter agreed (amongst other things) not (without the former's consent) to leave his present employment or his present dwelling-house, nor to part with any of his furniture, nor to pledge his credit, nor to make himself liable for any sum of money, whether legally or morally. In the words of the Master of the Rolls, "the deed savoured of serfdom," and was void. But a contract to serve for life, made without fraud or duress, is not invalid; as when a carrier sold his business and agreed with the purchasers to serve them in that business for the remainder of his life. A contract of service will not be directly and specifically enforced by a decree of specific performance; nor indirectly by an injunction, unless it contains an "independent negative stipulation" prohibiting the servant from taking other specified employment.

*Infants as servants.*—As we have seen (p. 33), the law has always favoured the capacity of an infant to enter into contracts for his employment; and provided that, viewed as a whole, they are fair and reasonable and beneficial to him, they are binding on him (*Clements v. London and North Western Railway Co.* [1894] 2 Q. B. 482).

*Form.*—No particular form is required by the law for contracts of service, apart from contracts with merchant seamen, which, as a general rule, must by statute be in writing in a form approved by the Board of Trade (p. 227); but, of course, if the contract is one which, by reason either of the date of its commencement or of its intended duration, is "not to be performed within the space of one year from the making thereof," it will fall within section 4 of the Statute of Frauds, and will not be enforceable by action "unless the agreement or some memorandum or note thereof shall be in writing and signed by

“the party to be charged therewith or some other person thereunto by him lawfully authorised.” So an agreement for a year’s service, beginning two days or a month hence, falls within the statute; but an agreement under which the year’s service is to begin the day after it is made, need not have a memorandum or note in writing, as the law does not reckon fractions of a day. Apart from these statutory requirements, a contract of service may be made by word of mouth, by unsealed writing, or by deed.

*Remuneration.*—The servant’s remuneration, which consists of money or some other valuable consideration, and is called ‘wages’ or ‘salary’ or ‘stipend,’ or by some similar term, according to the kind of work done and the taste of the parties, is usually either expressly fixed in the agreement between the parties, or implied by reference to some commonly accepted standard applicable to the work in question; but the contract is not void on the ground that no remuneration is agreed upon either expressly or by implication, and, provided that it is clear that the service is intended not to be gratuitous, the servant will be able to recover what the jury, or the judge acting as a jury, considers to be a reasonable remuneration. Usually the remuneration consists of a fixed sum paid periodically; but, in lieu of that or in addition to it, a superior servant, such as a manager of a branch of a business, may receive a commission upon the turn-over or profits of his department, or of the whole business. And, to prevent hardship in such cases, the Partnership Act, 1890, s. 2, has provided, that a contract for the remuneration of the servant or agent of a person engaged in a business by a share in the profits of the business, does not of itself make the servant or agent a partner in the business, or liable as such.

*Termination of the contract.*—The duration of the service, if not fixed by the agreement of the parties,

will depend upon the nature of the employment and the prevailing usage ; and the period of the payment of wages, *e.g.*, weekly, monthly, or quarterly, though not conclusive, may throw some light upon the matter. The old common law presumption that “if a man retain a servant generally without expressing any time, “the law shall construe it to be for one year,” has now very little vitality left ; and each case must be considered with reference to its own special circumstances.

(i) *Expiry of agreed period* ; and (ii) *notice*. A contract of service for an agreed period comes to an end, if not renewed, upon the expiry of that period, and no notice is required to determine it ; if for an indefinite period, it can be determined by either party giving to the other notice, the length of which may have been fixed by agreement between them, or, failing that, by custom (as in the case of domestic servants about to be mentioned) ; in the absence of agreement or custom, it must be reasonable, having regard to the circumstances of the case and the evidence of what is usual in the particular employment. (iii) *Justifiable departure of the servant* ; and (iv) *justifiable dismissal by the master*. We have seen it to be a general principle of the law of contract that, in the case of reciprocal promises, the performance of one of which is a condition precedent to the performance of the other, the failure of one party in the performance or further performance of his promise will excuse the other from the performance or further performance of his promise. The servant’s promise to serve the master, and the master’s promise to employ and remunerate the servant, are such a pair of promises ; and, if the servant is properly chargeable with wilful disobedience or habitual neglect of his master’s lawful orders, or gross incompetence where skill is involved and professed, or gross moral misconduct or some other misconduct (*e.g.*, taking secret



commissions) which is inconsistent with faithful service, his master is justified in saying: "Very well, you have broken your part of the contract; I shall treat the contract as at an end, and I dismiss you on the spot." Conversely, if the master behaves in such a manner that a servant would be justified in quitting his service, or if he wrongfully dismisses the servant, the latter is entitled to regard himself as relieved from further performance of the contract. It may happen that a master who is reluctant to dismiss a servant goes half way, and 'suspends' him, that is, tells him that he is not to perform his duties for the present but will nevertheless be entitled to receive his remuneration: for it is said that, apart from agreement, a master fulfils his contract by keeping the servant in his employment and paying him the agreed remuneration, and is not under an obligation to provide him with any work to do. But a recent decision has shown, that 'suspension' of a servant may very easily be so fundamental as to be equivalent to a repudiation of the contract, in fact, to dismissal, thus entitling the servant to elect to treat the contract as repudiated, and to sue for damages for wrongful dismissal. And this is particularly likely to be the case where the servant's remuneration includes (or consists of) a commission which he is thus prevented from exerting himself to earn. (v) *Servant's illness.* A contract of so intimately personal a character as the contract of service, is conditional upon the servant's health continuing to be such that he can perform his duties under it. If through illness he cannot do so, he commits no breach; but the master, if the illness is likely to be permanent, or to last so long that it would be unreasonable to expect the master to keep the servant, is entitled to put an end to the contract and dismiss the servant. But until he does so, he must continue to pay him the full remuneration due



to him under the contract. (vi) The *death* of either party determines the contract of service, but (vii) the *bankruptcy* of either party does not necessarily have this effect.

*Remedies for wrongful dismissal.*—As was said in a recent case, “wrongful dismissal is a mere illustration “of the general legal rule that an action will lie for “unjustifiable repudiation of a contract.” When the dismissal is wrongful, the servant is relieved from the necessity of further service, and can recover from his master (a) any remuneration already due in respect of a completed period of his service and in arrear—so much he can recover even when lawfully dismissed, (b) remuneration in respect of services actually rendered during the broken period, and (c) damages for the master’s breach of contract in preventing him from earning prospective wages under the contract and commission (if any), and ‘tips’ if it was part of the bargain that the servant should be at liberty to receive and retain ‘tips.’ But he cannot recover compensation, either for his “injured feelings, or for “the loss he may sustain from the fact that his having “been dismissed of itself makes it more difficult for “him to obtain fresh employment” (*Addis v. Gramophone Co.* [1909] A. C. 488). And the servant may not simply take a holiday until the date when his service would, but for the wrongful dismissal, have come to an end. He must make efforts to obtain other suitable employment, so as to mitigate his damage; and unreasonable refusal to accept other employment will have the effect of reducing the damages he will recover.

‘*Character.*’—The master is under no duty to give the servant a testimonial or ‘character’ on leaving his employment; but if, in doing so, or in giving a new prospective employer information regarding the servant, he uses words which are *primâ facie* a slander

or a libel upon the servant, the occasion is one of qualified privilege, and the servant can only recover damages for the slander or libel on proof of malice or other improper motive on the part of the master. The Servants Character Act, 1792, makes it a criminal offence, punishable by fine, and, in default of payment, by imprisonment with hard labour, for any person to make false statements, or to use false pretences or a false certificate, as to his past service, or to personate a master for the purpose of giving a false ‘character.’

*Restrictive covenants.*—Apart from express agreement, the servant may, after the termination of the service, enter into competition with his former master, either on his own account or as the employee of another; and he may even solicit his former master’s customers. But he must not extract from his master’s books a list of the customers, and then make use of it in competition with his master when the service is ended; nor may he make use for his own purposes, either during or after the service, of any secret recipe or formula or other information which has been communicated to him in confidence during the service. Hence it is common, in the case of superior servants, for a written agreement to be entered into, whereby the servant submits to some restraint upon his activities upon the termination of the service. This restraint, as we have seen (pp. 49–51), must not be undue, having regard to the interests of the master, of the servant, and of the public as consumers of goods and services; and from recent cases it appears, that the Court will only enforce a servant’s restrictive agreement when necessary to protect the former master against “injury by “misuse of the servant’s acquaintance with customers “or knowledge of trade secrets,” and not against his servant’s competition *per se*, or the use of the personal skill and knowledge acquired by him in his master’s

business (*Attwood v. Lamont* [1920] 3 K. B. 571). And the master's wrongful dismissal of his servant *ipso facto* discharges the servant from any restrictive agreement into which he may have entered (*General Billposting Co. v. Atkinson* [1909] A. C. 118).

*Miscellaneous.*—A master must indemnify his servant against the consequences of any act done upon the master's instructions which is not obviously unlawful; for instance, if I order my servant to take to a shop and sell some books apparently mine but in fact yours, and you sue my servant and recover damages for conversion. And, conversely, the servant must indemnify his master against the consequences of any wrongful act or omission on the part of the servant causing injury to the person or property of the master or of third persons; for instance, an action against the master for damage caused by the servant's negligence. Either master or servant is entitled to use reasonable force in defending the other against violence; and a master is justified in 'maintaining' his servant in bringing a civil action against a third person, or in defending one brought against him, in circumstances in which, if the party maintained were not his servant, his assistance would constitute the tort of Maintenance (see pp. 398-400).

## 2. PARTICULAR CLASSES OF SERVANTS.

We shall now consider separately some of the principal classes of servants, and draw attention to the chief modifications of, and additions to, the preceding general rules, which are peculiarly applicable to their contracts of service. We shall deal with (i) menial or domestic servants; (ii) workmen, including labourers in agriculture; (iii) merchant seamen; (iv) apprentices; and (v) servants of the Crown.

(i) *Menial servants* are probably so called from their connection with the household, for which the popular Latin word was *mansionata* and the old English word *meiny*. The authorities differ on the question whether the term 'menial' is wider than 'domestic'; and we can say with safety either that it is a little wider than 'domestic,' or that it is equivalent to 'domestic' in its widest sense. 'Menial' includes, in addition to domestic servants in the narrow sense (*e.g.*, cooks, housemaids, parlour-maids, etc.), a coachman, a groom, a gardener living in a house within his master's grounds; but not, it is said, a governess, or a private tutor, or a farm bailiff. Although it is usual to engage menial servants at a fixed amount of wages by the year, there is generally no express stipulation as to the time that the service is to last. In such cases it used to be said that the hiring is by the year; at any rate, either party may at any time determine it at pleasure, upon giving a month's notice, for which, in the case of the master wishing to determine it, a month's wages are considered as an equivalent. But the servant is not entitled to 'board wages,' *i.e.*, compensation for loss of board and lodging, in addition; except that, where a servant who has properly determined his contract by giving a month's notice is subsequently wrongfully dismissed by the master before the expiry of the month, he is entitled to receive, in addition to ordinary wages, 'board wages' in respect of the period between the date of the wrongful dismissal and the expiry of the month. And recently a custom has been judicially recognised whereby either party may determine the contract of service at the end of the first month, by giving notice during or at the end of the first fortnight; and the Court may, and perhaps must, now take notice of and apply this custom without requiring any evidence in support of it (*George*



v. *Davies* [1911] 2 K. B. 445). Any custom, were it proved, that a domestic servant leaving his or her service at the end of the first month, is entitled to have back any 'character' which was handed by him or her to the master at the beginning of the service, would, it has been held, be bad and unreasonable, and would not be enforced.

It is frequently a term of the contract of service, either express or implied, that the servant should be properly fed and lodged by the master; but the servant is not usually entitled to be provided by the master with medicine and medical attendance.

(ii) *Workmen*, including agricultural labourers, that is, broadly speaking, persons doing manual or mainly manual work in agricultural or industrial employment. The past hundred years have seen a continuous stream of legislation regulating the contracts of these classes of servants; and the stream has not yet ceased to flow. Their wages, whether paid weekly or fortnightly or otherwise, may be calculated upon the time worked ('time rates') or the work done ('piece rates'). They may be engaged for a definite or for an indefinite period; and the custom of one month's notice, observed in the case of menial servants, does not in general apply to them. Thus, their contracts may be determined by any notice which is agreed or is customary in the particular employment and place, or is reasonable in the circumstances. Agricultural labourers and miners were at one time, in some parts of England, hired by the year; and it is believed that in some districts the former are still so engaged. The statutes that we shall now mention mostly contain their own definitions as to the classes of servants to which they apply, and must be individually referred to for that purpose; but, in the main, they apply to workmen engaged in agricultural or industrial employment,



except when they clearly relate to a particular employment, *e.g.*, the Coal Mines (Minimum Wage) Act, 1912.

*Disputes between masters and workmen.*—Ever since the visitations of the Black Death in the fourteenth century, and the ensuing industrial unrest, forced upon the attention of the legislature the existence of labour problems, the Justices of the Peace have been intimately connected with the regulation of the relations between masters and workmen; one of the earliest and most important of the Justices' duties being the administration of the system of the State regulation of labour set up by the Statutes of Labourers in the fourteenth century, and lasting for several centuries. By a number of particular statutes passed in the nineteenth century, to deal with a variety of different trades and industries, Parliament has conferred upon the Justices of the Peace jurisdiction to determine complaints between workmen and their employers, and to arrange by arbitration, under their direction, such differences as admit of that mode of settlement; and the Justices, when sitting as a court of summary jurisdiction, have also acquired, by the Employers and Workmen Act, 1875, a concurrent *civil* jurisdiction with the County Courts, in disputes between parties standing in that relation to each other, where the sum claimed does not exceed £10. Under the Conciliation Act, 1896, which embodies previous legislation on the subject, Boards established for the purpose of settling disputes between employers and workmen by conciliation or arbitration, may be registered at the Ministry of Labour; and the Ministry may itself intervene in order to arrange, or to provide for the arrangement of, the dispute or difference (New Ministries and Secretaries Act, 1916).

*Compulsory minimum wages.*—By the Trade Boards Act, 1909 and 1918, Trade Boards, on which both employers and workmen are represented, have been

established for fixing the rates of wages in certain trades ; and an employer is punishable for employing any persons at wages lower than the rates so fixed. And by the Coal Mines (Minimum Wage) Act, 1912, provision is made for the fixing by similar Boards of minimum rates of wages for all workmen employed in a coal mine below ground ; and it is an implied term of every contract for the employment of such a workman, that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act and applicable to the workman, subject to certain exceptions in the case of workmen who are excluded under the district rules from the operation of this provision, or who have forfeited the right to the minimum rate by reason of failure to comply with conditions as to efficiency or regularity of attendance.

*Method of payment of wages.*—Under the Truck Acts, 1831 to 1896, the wages of a workman, that is, broadly speaking, all persons engaged in manual labour other than menial or domestic servants, must be paid to him in current coin of the realm, and not in kind. Deductions by the master for goods or services supplied are void, with certain exceptions permitted when there is a contract in writing. Deductions by the master in respect of fines or damaged materials and tools, are void, unless they are made in pursuance of a public notice or a signed contract and are reasonable. And contracts by workmen to spend their wages at any particular shops are prohibited. So strictly are these Acts enforced, that it has been held, that an employer may not deduct from wages due to a workman the amount of damages awarded to the master by a Court under the Employers and Workmen Act, 1875, in respect of a breach of contract by the servant. The Shops Clubs Act, 1902, proceeds on a similar principle, in making it an offence for an employer to impose it as a condition

of employment, that a workman should become a member of a shop-club or thrift fund; unless such club or fund is certified in accordance with the Act by the Registrar of Friendly Societies, and duly registered under the Friendly Societies Act, 1896.

By the Wages Attachment Abolition Act, 1870, no Court may make an order attaching (that is, by proceedings known as ‘garnishee proceedings’) the wages of any “servant, labourer or workman,” a description which covers more than merely workmen engaged in agriculture or industry. (Similar legislation protects from attachment military pay and pensions, Post Office Savings Bank deposits, weekly payments under the Workmen’s Compensation Act, and benefits under the National Insurance (Health) Acts, 1911 to 1920, and (probably) under the Unemployment Insurance Act, 1920.) By the Payment of Wages in Public Houses Prohibition Act, 1883, and other statutes, the payment of wages to ‘workmen’ at or within a public house (except of course to servants employed in connection with it) is prohibited. By the Bankruptcy Act, 1914, s. 33, and the Companies (Consolidation) Act, 1908, s. 209 (in both cases re-enacting earlier statutes), the wages or salary of any ‘clerk or servant’ up to £50, in respect of the four months preceding the death of the master or the date of the receiving order or of the winding up order, respectively, and the wages of any ‘labourer or workman’ up to £25 in respect of the two months preceding the same dates, rank (together with certain other privileged debts) in priority to all other debts, in case of the death insolvent or of the bankruptcy of the master, or, where the employer is a company, in case of its winding up.

(iii) *Merchant seamen*.—The laws relating to merchant seamen are mainly contained in Part II. of

the Merchant Shipping Act, 1894, as amended by the Merchant Shipping Act, 1906, and the Merchant Shipping (Seamen's Allotment) Act, 1911. They deal with most matters affecting the interests of seamen as such, *e.g.*, their engagement, food, accommodation, health, discipline, discharge, wages, relief from distress when left abroad, and protection against imposition. The term 'seaman,' for the purposes of this legislation, includes every person (except masters, pilots, and, unless otherwise mentioned, apprentices) employed or engaged in any capacity on board any ship that goes to sea; and the term 'master' includes every person (except a pilot) who has command of a ship.

Agreements for service with the crew of a ship must, as a general rule, be made in writing in a form approved by the Board of Trade, and are usually called the 'ship's articles.' They must contain, amongst other particulars: (1) a description of the nature and probable duration of the intended voyage, or the maximum period of the engagement, and the parts of the world to which the voyage is not to extend; (2) the amount of wages which each seaman is to receive, and the capacity in which he is to serve; and (3) any regulations approved by the Board of Trade and agreed to by the parties, as to conduct on board, and fines or other lawful punishment for misconduct. In the case of foreign-going ships, the agreement with the crew must be signed by each seaman in the presence of a superintendent of the local mercantile marine office. When his engagement terminates, the seaman must receive a proper discharge and payment of his wages, and also be furnished with a proper account in a form approved by the Board of Trade, showing the amount of the wages earned, and all deductions made in respect of fines or forfeitures for misconduct. If discharged from a British ship at a foreign port, the seaman is entitled to be provided with a passage home;



and apprentices are comprised within the scope of the statutory provisions made for the relief and repatriation of distressed seamen.

It may be noted that a complete change in the character of a voyage, *e.g.*, from a purely commercial venture to a warlike one, by reason of the outbreak of war, with its attendant risks of mines and capture, has been held to discharge a seaman's contract of service, with the following results: (i) if the change be due to the action of the ship-owner in breach of the contract, the seaman can recover wages up to the end of his engagement, and (ii) whatever be the cause of the change, valuable consideration exists to support a promise by the master on behalf of the ship-owner to pay an increased remuneration to the seaman for continuing the voyage. And the detention of a merchant ship by the enemy, by making further performance of the contract of service impossible, puts an end to it, and disentitles the seaman to recover any further wages (*Horlock v. Beal* [1916] 1 A. C. 486).

A seaman has a *maritime lien* (p. 621) on the ship and freight for wages, and any other sums made by statute recoverable by him as wages; and, by virtue of his lien, he has priority over most other creditors of the ship-owner. For the recovery of wages he has the following remedies: (1) if the wages claimed do not exceed £50, he can recover them by order of a Court of summary jurisdiction; (2) if they do not exceed £100, he can recover them in a common law action brought in a county court; (3) if they exceed £50 but do not exceed £150, he may bring an action *in rem* against the ship in a county court having Admiralty jurisdiction; (4) if they exceed £50, he can recover them by action brought in the High Court against the ship-owner, or by proceedings *in rem* against the ship in the Admiralty Division; (5) if they do not exceed £50, he can sue *in rem* in the High Court



or in a county court, when the ship-owner has been adjudged bankrupt, or the ship is already under the arrest of the court. In Admiralty actions, costs are now in the discretion of the court, whatever the amount of the sum recovered.

The master also of a ship has by statute a *lien* for his wages, and for disbursements properly made by him on the ship's account and on the owner's credit, and can recover them by means of an Admiralty action *in rem*.

In respect of personal injury in the service of the ship, or illness, a master or seaman has the following rights and remedies: (1) By ss. 34 and 35 of the Merchant Shipping Act, 1906, including for this purpose apprentices, the expense of medical attendance and treatment, and of maintaining him until he is cured, or dies, or is returned to a proper return port, and of conveying him there, must be defrayed by the ship-owner without any deduction from his wages. (2) At Common Law, he is entitled to recover damages if the injury was caused by the ship-owner's negligence, or by a breach of his statutory duty to use all reasonable means to secure that the ship was in a seaworthy condition; but he cannot recover damages at Common Law if the injury was caused by the negligence of any other member of the crew or fellow-servant in a common employment with him, or was contributed to by his own negligence (it may be pointed out here that the Employers' Liability Act, 1880, does not apply to masters of ships or to seamen). (3) If the injury is one for which the ship-owners are probably liable to pay damages at Common Law, the ship may be detained within the jurisdiction by virtue of the Shipowners' Negligence (Remedies) Act, 1905, until the claim is satisfied or security for it is given, provided the injury has been sustained on or about the ship in any port of the United Kingdom, and that none of the owners reside therein. (4) For any personal injury by accident,

arising out of and in the course of his employment (but not, it has been held, for an industrial disease), a master or seaman (including an apprentice) is entitled to recover compensation under the Workmen's Compensation Act, 1906, provided he is a workman as defined in the Act, and is a member of the crew of a ship registered in the United Kingdom, or of any other British ship whose owner or manager resides, or has his principal place of business, therein. The weekly payment, however, is not payable under the Act in respect of the period during which the ship-owner is liable to defray the expenses of maintenance. The ship may be detained in England until the compensation due under the Act is paid, or security is given for it, if none of her owners reside in the United Kingdom. (5) He may, by virtue of the Maritime Conventions Act, 1911, s. 5, bring an action *in rem* or *in personam* in any competent court having Admiralty jurisdiction in cases of damage.

The general liability of an employer for personal injuries sustained by his servant is dealt with later (pp. 298-308) ; but it has seemed convenient to dispose here of the special case of merchant seamen and the masters of ships.

(iv) *Apprentices*, in the strict legal sense, are servants, usually but not necessarily infants, who agree to serve their masters with a view to learning some trade or business, and whose masters on their part agree to instruct them. The contract is usually for a term of years and is usually embodied in a deed, in which case the apprentice is said to be bound by an indenture of apprenticeship. It is customary for the apprentice to execute the deed or other instrument of apprenticeship; and it is also usual for his father or some person standing *in loco parentis* to execute the deed or other instrument, and thus become liable for

the due observance by the apprentice of his obligations thereunder. The type of apprentice with which the reader is probably most familiar being the solicitor's articulated clerk, it may be well to mention that this contract of apprenticeship is the subject of special regulations contained in the Solicitors Acts, in addition to being governed by the general law on the subject of apprentices.

There exist a number of statutes under which the Justices of the Peace may settle disputes between apprentices and their masters, and may discharge the apprentice from his indenture upon reasonable cause shown ; and, under the Employers and Workmen Act, 1875, any dispute between an apprentice (upon whose binding either no premium or a premium not exceeding £25 was paid) and his master, may be heard and determined either by the Justices, or by the county court, in the same way as if the dispute was one between an employer and a workman. In such a case, the Justices may make an order directing the apprentice to perform his duties, and may enforce the order by imprisonment for a period not exceeding fourteen days ; or they may, in a proper case, rescind the instrument of apprenticeship, and require the whole or any part of the apprenticeship premium to be refunded.

It is said that a master may administer physical chastisement to his apprentice, provided he do it with moderation, though he may not so correct his domestic or other servants ; but at the present day a master could hardly be advised to avail himself of this right. An infant apprentice, like a menial servant, is (in the absence of special agreement) entitled to receive proper maintenance from his employer. He is also entitled to receive medicine and medical attendance ; though, in the case of other servants, it is not the master's duty to provide these.

The Bankruptcy Act, 1914, s. 34, contains provisions enabling the bankrupt or any person who is an apprentice, or an artied clerk, to the bankrupt, to effect a complete discharge of the indenture of apprenticeship or the articles of agreement, by giving notice to the trustee in bankruptcy to that effect; and the trustee may repay out of the bankrupt's assets the whole or part of any premium paid by the apprentice or artied clerk, or may transfer the indenture of apprenticeship or articles of agreement to any other person.

There still remain on the statute book a number of statutes containing elaborate regulations for the apprenticeship by Boards of Guardians of pauper children, called 'parish apprentices'; but, owing to the decline in this system, these provisions need not be considered here. Apprenticeship to the mercantile marine, and to the sea-fishing service, is governed by the Merchant Shipping Acts.

(v) *Servants of the Crown*.—The general rights and remedies of the subject against the Crown are discussed in a later chapter (xxxiii.); but a few words upon the position of Crown servants may be said here. Their service is in many cases the subject of special statutes and codes of regulations, to which they must conform, and which embody the terms of their service; for instance, in the case of persons in the naval, military, or air service of the Crown. But such persons are not thereby exempt from the ordinary jurisdiction of the courts of law, and are subject to the duties and liabilities both of the citizen and of the sailor, soldier, or air-man as the case may be, while disentitled, by reason of the terms of their service, to some of the rights of the ordinary citizen. Almost every servant of the Crown, whether in the civil, naval, military, or air service, is liable to be dismissed at the



pleasure of the Crown, even though he be engaged for a definite term of years. As a matter of law, the Crown is incapable of entering into a contract of service binding upon it. Such a contract (if contract it must be called) is enforceable by the Crown, but not against it; and the ordinary remedy of the subject for a breach of contract by the Crown, viz., a petition of right, does not lie (*Leaman v. The King* [1920] 3 K. B. 663). This rule is said to be dictated by considerations of public policy and convenience; and it should be noted that, in a very few exceptional cases, similar considerations have led to the making of special statutory provision conferring upon certain servants of the Crown a less precarious tenure of office. Thus, by s. 5 of the Judicature Act, 1875, following the Act of Settlement (1700), the judges of the High Court and of the Court of Appeal (other than the Lord Chancellor) hold their offices “during good behaviour, “subject to a power of removal” by the Crown upon an Address being presented to the Crown by both Houses of Parliament requesting their removal. Again, the Comptroller and Auditor General, who holds the master-key of our financial machine, and the Assistant Comptroller and Auditor General, have been placed by the Exchequer and Audit Departments Act, 1866, in a similar position.

HEALTH AND UNEMPLOYMENT INSURANCE—(i) The National Insurance (Health) Acts, 1911 to 1920, have instituted a scheme for the insurance of the health of many classes of employees by means of contributions from the employer, the person employed, and the Treasury. It is the duty of an employer to pay the contributions, which are payable by himself and by the employee; and he is entitled to recover from the latter, by deduction from his wages or otherwise, the amount payable by the employee. An employer who

fails to fulfil his liabilities under the Acts is liable to conviction, accompanied by fine, on summary prosecution; and he is also liable to civil proceedings by any workman who, being a member of an 'approved society,' has been deprived of any benefit by failure of his employer to pay contributions properly payable by such employer.

(ii) Under the National Insurance Act, 1911, there were certain trades (*e.g.*, building, shipbuilding, mechanical engineering) in which insurance against unemployment was compulsory; but the provisions to that effect are now merged in a more comprehensive scheme instituted by the Unemployment Insurance Act, 1920, which is based upon contributions from the employer, the person employed, and the Treasury, and applies to all persons employed, except those employed in the following occupations: agriculture, domestic service, the naval, military, or air forces of the Crown, the police force, railway companies and public utility companies, most teachers in State-schools and State-aided schools, non-manual employees receiving more than £250 per annum, and a few other exceptions. The machinery is similar to that of the National Insurance Health Acts; and it should be noted, that no benefit is payable to "an insured contributor who has lost employment by reason of a "stoppage of work which was due to a trade dispute "at the factory, workshop, or other premises at which "he was employed." Thus it was decided by the appropriate tribunal, that the coal miners were not entitled to receive unemployment benefit upon the occasion of the universal stoppage at the mines in 1921.

The Workmen's Compensation Act, 1906, which provides for the payment by the master of compensation to a servant (or to his dependants in the event of his death) for injury by accidents arising out of

and in the course of his employment, and applies to (substantially) all employees, other than non-manual workers whose remuneration exceeds £250 a year, and other than the police and persons in the naval, military, or air forces of the Crown, will be more conveniently dealt with in a later chapter (pp. 303–308).

CONTRACT FOR WORK AND LABOUR is a convenient term used to describe a number of miscellaneous contracts, not fully specialised, but all involving the performance of work or the rendering of services, in circumstances which do not constitute the relation of master and servant or principal and agent. On the one hand, they differ from the contract of service by reason of the absence of the order and control of a master; on the other, from the contract of sale of goods in not being intended to result in transferring for a price from one person to another an article in which the latter had no previous property. For instance, I engage a surgeon to operate on me, a ‘free lance’ journalist to write a series of articles for my magazine, a tailor to repair my clothes, a carpenter to convert a stable into a garage in accordance with a specification which he is free to carry out in any way that seems best to him, provided that he produces the stipulated result; these are all contracts of work and labour, of which it will be noticed that one involves a bailment (Chap. IX.). The services rendered are not usually gratuitous; but if that is intended, the position of the party undertaking to render them is covered by the rule that “if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it.” And, in some cases, an action in tort would lie for improper performance, *e.g.*, an action against a surgeon for negligently sewing up a sponge in his patient’s body.

## NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter, the student should refer to Macdonell, "*Law of Master and Servant.*"

The law will be found summarised in "*Digest of English Civil Law,*" pp. 207-227; 455-463.

The following are some of the chief sources and illustrations of the principles discussed in this chapter:—

*Clements v. London and North Western Railway Co.* [1894] 2 Q. B. 482.

*George v. Davies* [1911] 2 K. B. 445.

*Robb v. Green* [1895] 2 Q. B. 315.

*General Bill-posting Co. v. Atkinson* [1909] A. C. 118.

*Turner v. Mason* (1845) 14 M. & W. 112.

*Boston Deep Sea Co. v. Ansell* (1888) 39 Ch. D. 339.

*Lindsay v. Queen's Hotel Co.* [1919] 1 K. B. 212.

*Addis v. Gramophone Co.* [1909] A. C. 488.

*Dunn v. The Queen* [1896] 1 Q. B. 116.

*Leaman v. The King* [1920] 3 K. B. 663.

*Truck Acts*, 1831 to 1896.

*Employers and Workmen Act*, 1875.

*Conspiracy and Protection of Property Act*, 1875.

*Conciliation Act*, 1896.

*Industrial Courts Act*, 1919.

*National Health Insurance Acts*, 1911 to 1921.

*Unemployment Insurance Acts*, 1920 and 1921.]

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## CHAPTER XIII.

## THE CONTRACT OF PARTNERSHIP.

*Definition and formation.*—The law on the subject of partnership has been codified in the Partnership Act, 1890, which defines a partnership as “the relation “which subsists between persons carrying on a business in common with a view of profit,” otherwise than as a company registered under the Companies (Consolidation) Act, 1908, or otherwise incorporated, or as a company (called a Cost Book Mining Company) engaged in working mines within the Stannaries of Cornwall and Devon.

A partnership may exist, whether the persons are to participate in equal shares or in any other proportions. But a man does not become a partner merely from owning property in common with others, nor does participation in the profits of a business form conclusive evidence of the existence of a partnership, as was at one time supposed. Participation in profits is, however, declared by the Partnership Act to be an important element in determining whether or not the parties interested in the common business are partners therein, and is *primâ facie* evidence that they are partners. It is, however, expressly provided by that statute: (1) that the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business, does not of itself make him a partner in the business, or liable as such; (2) that a contract for the remuneration of a servant or agent of a person engaged in a

business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business or liable as such ; (3) that a person, being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business, or liable as such ; (4) that the advance of money by way of loan to a person engaged, or about to engage, in any business, on a written contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business (the contract being signed by all parties), does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such ; and (5) that a person receiving, by way of annuity or otherwise, a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not, by reason only of such receipt, a partner in the business, or liable as such. The Act, however, provides, with regard to the fourth and fifth of the above-mentioned cases, that, in the event of the bankruptcy or insolvency of the borrower or purchaser, the lender of money and the vendor of a goodwill can only recover the debt or share of profits contracted for, after all other creditors of the trader for valuable consideration have been satisfied.

The number of persons who may be associated together in a partnership must not exceed twenty in ordinary cases, or ten in the case of a banking business ; for otherwise, the association will, by s. 1 of the Companies (Consolidation) Act, 1908, be illegal, unless it be registered as a company. A partnership is usually constituted by a written agreement, called the ' articles of partnership,' which is frequently under seal ; but a partnership may also be constituted without any

writing, and may even be implied from the conduct of the parties ; unless writing is required by s. 4 of the Statute of Frauds, either because the date of commencement is more than a year distant, or because the partnership is intended to last for more than a year, and there has been no adequate part performance. The partners constitute what in law is called a ' firm ' ; and they trade under the ' firm name.' But the firm, unlike a company or corporate body, is not a ' person ' of itself ; and the individual partners do not lose their individuality therein. Partners may, however, by the Rules of the Supreme Court, now sue and be sued in their firm name. As was said by Lord Justice Farwell : " the firm name is a mere expression, not a legal " entity, although for convenience under [the Rules " of Court] it may be used for the purpose of suing " and being sued." A judgment against a firm carries extensive powers of issuing execution against the partnership property, and against persons who acknowledge themselves, or are proved, to be partners.

*Agency of partners.*—One of the most important doctrines attaching to the relation of partnership is, that " every partner is an agent of the firm and his " other partners for the purpose of the business of the " partnership." The result of this principle is, that a contract made, or act done, or instrument executed, by any partner " for carrying on in the usual way " business of the kind carried on by the firm," is, in point of law, the contract or act or instrument of all the partners ; consequently, such contract or act is binding upon them all, so as to render each partner liable upon it individually. Even the tortious act of one partner will render the firm and his co-partners liable, if it was done within the general scope of his authority as a partner, or with the actual authority of his co-partners. But one of the consequences of the Statute of Frauds Amendment Act, 1828, is, that one

partner cannot make the firm or his co-partners liable upon “any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person” (*i.e.*, other than the firm itself) “to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*).” For any such representation or assurance must “be made in writing, signed by the party to be charged therewith.”

The rule that each partner is the agent of the firm and of his other partners for the purpose of the partnership business, holds good, in a general way, even where the act of the individual partner would, as between himself and his co-partners, be contrary to the partnership articles. But the firm is not bound (i) where the partner so acting has in fact no authority to act for the firm, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner; (ii) where a partner pledges the credit of the firm for a purpose apparently not connected with the firm’s ordinary course of business, and he is not in fact specially authorised by the other partners; (iii) where it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, and an act is done in contravention of the agreement with respect to persons having notice of the agreement.

And the implied authority of partners to bind their firm is one which does not extend to matters extraneous to the joint concern, nor to matters which, though connected with it, are, by the ordinary usage of business, transacted with the express and formal intervention of all the partners. For example, one member of a firm has no implied authority to refer to arbitration a dispute in which the partnership is



involved with a stranger, nor to execute a deed in the name of the partnership, nor (unless it is possible to imply an authority to do so from the circumstances of the particular firm or the usage among firms carrying on a similar business) to bind the firm by a guarantee. In these cases, the other members of the firm must either be actual parties to the transaction, or must give their special consent that the one partner should act for them in the matter; and that special consent must be authenticated by deed, where a deed is to be executed in the name of the partnership. The general rule is, that it is only in the case of trading partnerships that a partner can bind his firm upon a bill of exchange or a promissory note, or in borrowing money on the credit of the firm. In the case of any other partnership, in order to make the firm liable upon a bill or note, or for money borrowed upon its credit, it must be shown that such a course of dealing is necessary or usual in the particular business; but, whatever the nature of the business, a partner can bind the firm by an ordinary cheque on the firm's banking account.

*Doctrine of 'holding out.'*—A partnership may, as regards strangers or third persons, be an actual partnership, although it purports not to be so as between the partners themselves. For a man who is not really a partner, may nevertheless allow his credit to be pledged as a partner; as in a case where his name appears in the firm, or where he interferes in the management of the business, or otherwise 'holds himself out' (*i.e.*, represents himself or knowingly suffers himself to be represented) as a partner, so as to produce a reasonable belief in strangers that he is a partner. In some cases he is answerable, as an apparent partner, to any one who, on the faith of such representation, has given credit to the firm; whether the representation has or has not been made

or communicated to the person so giving credit by or with the knowledge of the apparent partner. But where, after a partner's death, the partnership business is continued in the old firm name, the continued use of that name, or of the deceased's name as part thereof, does not of itself make his executors or administrators, or his estate or effects, liable for any partnership debts contracted after his death.

*Dormant partners.*—Conversely, it frequently happens also, that a partnership comprises some member not generally known to be interested in the business or adventure ; the firm name not usually containing the names of all the members. A partner thus unknown to the public is a 'dormant' partner ; and every person dealing with the firm is entitled, when he discovers the existence of such dormant partner, to hold him chargeable with the others ; but, as we shall see later (p. 243), a dormant partner is, upon retirement, in a more favourable position than the ordinary partner, in not requiring to give notice of his retirement to the existing customers of the firm or to the public generally.

*Nature of liability of partners.*—Upon debts, and other obligations arising from contracts which bind the firm, whether made by the firm or by one or more partners in such circumstances as to bind the firm, every partner is liable *jointly and not severally*. The other party seeking to enforce the contract should sue the firm in the firm name. If, however, he sues only one or some of the partners, that one or more cannot object that the others are not made defendants with them ; but the plaintiff cannot subsequently sue the others. The estate of a deceased partner is liable in a due course of administration for the debts and obligations of the firm, incurred while he was a partner, so far as they remain unsatisfied ; but only subject to the prior payment of his separate debts.

For torts, and for the misapplication of money for which the firm is liable, every partner is liable *jointly with his co-partners, and severally* : so that the injured party, although his usual course would be to sue the firm in the firm name, is allowed to bring one or more successive actions.

*Duration of liability.*—A partner who retires from a firm does not thereby cease to be liable for partnership debts or other obligations (including liabilities on torts) incurred before his retirement ; unless by means of a tripartite agreement (called a *novation*) to which he and the members of the firm as newly constituted and the creditors are parties, and which may either be express or be implied from the course of dealing between the creditors and the firm as newly constituted, the retiring partner is discharged. An incoming partner does not become liable for anything done before he became a partner, unless by a similar tripartite agreement (also called a *novation*) he agrees to make himself liable. A retiring partner (other than a dormant partner) will, unless certain steps are taken to prevent it, continue to become subject, as if he were still a member of the firm, to new liabilities incurred by the firm. The necessary steps are, that old customers of the firm should receive notice of his retirement, and that an advertisement should be inserted in the *London Gazette* which amounts to adequate notice to new customers. But death and bankruptcy are on a different footing, being regarded as more notorious ; and the estate of a deceased or a bankrupt partner does not become subject to liabilities incurred after the death or bankruptcy, so that no such notice to customers is necessary. And, for the reason that he is not known to the public as a member of the firm, no notice is necessary upon the retirement of a ‘dormant’ partner (p. 242), to determine his liability upon the future obligations of the firm.

*Relations of partners to one another.*—Whether or not it is right to include partnership in that group of contracts (pp. 64–65) in the negotiation and formation of which there must be the utmost good faith and a disclosure of all material facts (a point on which the authorities are not unanimous), it is abundantly clear, from the Partnership Act and from the decisions of the Courts, that the utmost good faith must characterise the mutual dealings of the partners. Every partner must render true accounts and full information of all things affecting the partnership to his co-partners; he must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property or of the partnership name or business connection. Nor must he, while he is a partner, carry on any business of the same nature as, and competing with, that of the firm; if he does so, he must account to the firm for all profits so made.

The rights and duties of the partners towards one another, and their respective interests in the partnership property, and in the capital and profits of the business (which need not be equal), are usually regulated by the ‘articles of partnership,’ and, in default of an agreement, written or oral, are governed by the Act. Apart from agreement, no majority of the partners can expel a partner, or introduce a new partner; and every partner is entitled to take part in the management of the partnership business.

If one partner assigns to a stranger his share in the partnership, either absolutely or by way of mortgage or redeemable charge, the assignee is entitled to that partner’s share of the profits on the basis of the accounts agreed to by the other partners. But he acquires no right to interfere in the management of the partnership



business ; though the assignment does not *ipso facto* effect a dissolution of partnership.

The private creditor of a partner who has obtained judgment against him is not allowed to issue execution against any partnership property ; for that can only be done upon a judgment against the firm. But any person who has obtained a judgment against a partner may apply to the Court for an order charging that partner's interest in the partnership property and profits with the payment of the separate judgment debt, and for the appointment of a receiver, and for the necessary accounts and enquiries. Such a charging order entitles the other partners to redeem the share so charged, and, in the case of a sale being ordered by the Court, to buy it ; and, at their option, they may also dissolve the partnership.

*Dissolution of partnership.*—A partnership may be dissolved, if the period of its proposed duration be indefinite, at the pleasure of any partner ; unless it has been agreed that it shall be terminated by mutual arrangement only. Or if, as is more frequent, the partnership be for a term certain, it may be dissolved, either by the natural expiration of that term, or, at an earlier period, by the mutual agreement of the parties, or (at the option of the other partners) by the fact of one partner allowing his share to be charged with payment of a separate judgment debt, or by a decree of the Court, given upon grounds specified in the Act. Moreover, the death or bankruptcy of any of the partners will, in any case, amount to a dissolution of the partnership, as regards all the partners ; unless the partnership articles should provide to the contrary. A partnership is also dissolved by the happening of any event which renders its further continuance illegal ; for instance, upon the outbreak of a war which makes one of the partners an enemy in the territorial sense (see p. 32).

When a partnership entered into for a fixed term is continued after the full expiration of the term, and there is no new deed of partnership or express new partnership agreement, the rights and duties of the partners remain the same as they were at the expiration of the old term, so far as is consistent with the incidents of a partnership at will; except, of course, when the partnership is (as it may be) merely continued with a view to the due winding up thereof. In this case, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far only as may be necessary to wind up the affairs of the partnership, and to complete its unfinished transactions (*Re Bourne* [1906] 2 Ch. 427).

On a dissolution of the partnership, every partner has a right to notify customers of the firm thereof, and to have it publicly notified in the *London Gazette*; to have the property of the partnership, including the goodwill of the business, applied in payment of the debts and liabilities of the firm; to have the surplus assets applied in paying to each partner any advances made by him and his share of capital; and to have any ultimate residue divided among the partners in the proportion in which profits are divisible. But where the final accounts show that there has been a loss of capital, such loss must first be made good by the partners in the proportions in which they were entitled to share profits; and the assets of the firm, including the sums so contributed to make up loss of capital, will then be applied in paying rateably to each partner what is due to him in respect of capital. And where a partnership was dissolved by the outbreak of a war which made one partner an alien enemy in the territorial sense (see p. 32), it was held that the enemy partner would be entitled to receive (upon the conclusion of peace) not merely the value of his share as at the date of the outbreak of war,

but, in addition, a share of the profits made after the outbreak of war by the English partner in carrying on the business with the aid of the enemy partner's share of the capital (*Stevenson's Case* [1918] A. C. 239).

When the intervention of the Court is required to dissolve, or in the course of the dissolution of, a partnership, or in the taking of partnership accounts, the appropriate tribunal is the Chancery Division, to which such matters were specifically assigned by the Judicature Act, 1873, s. 34.

*Goodwill*.—Important questions often arise upon a dissolution of partnership, as to the destination of the goodwill of the business. Who is entitled to it, and what does the ownership of it entitle him to do ? (i) In the absence of any agreement as to the destination of the goodwill, each partner may carry on the business in the old firm name, provided that, by doing so, he does not expose the other to liability as an ostensible partner ; and the mere fact of that other's name being part of the firm name does not necessarily have that effect. (ii) On the other hand, if it is agreed, either in the articles of partnership or upon the dissolution, that one partner shall have the goodwill (which is usually held to pass under the description 'assets'), that partner is not only entitled to carry on the business in the old firm name, so far as he can do so without exposing the other to liability, but may also restrain that other by injunction from soliciting the customers of the old firm (called 'the order in *Trego v. Hunt*' [1896] A. C. 7), though not from merely setting up or being engaged in a competing business.

*Limited partnerships*.—By the Limited Partnerships Act, 1907, it is enacted, that limited partnerships may be formed, which must, however, be registered with the Registrar of Joint Stock Companies. Such partnerships (which are rare) must consist of one or more *general* partners, who are liable for all debts

and obligations of the firm, and of one or more *limited* partners, who are not liable beyond the capital contributed by them on entering the partnership. A limited partner is precluded from taking part in the management of the firm's business, has no power to bind the firm, and is in other respects different from a general partner. But, except as provided by the Act of 1907, a limited partnership is governed by the Partnership Act, 1890, and by the rules of law and equity, in the same manner as an ordinary partnership. It is now wound up in bankruptcy, not under the provisions of the Companies Act.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of this subject the student should refer to Pollock, Sir F., "*Digest of the Law of Partnership.*"]

The law will be found summarised in "*Digest of English Civil Law,*" pp. 262–289.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Cox v. Hickman* (1860) 8 H. L. C. 268.

*Hamlyn v. Houston* [1903] 1 K. B. 81.

*Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. 152.

*Re Bourne* [1906] 2 Ch. 427.

*Trego v. Hunt* [1896] A. C. 7.

*Burchell v. Wilde* [1900] 1 Ch. 551.

*Stevenson (Hugh) & Sons, Ltd. v. A.-G. für Cartonnagen Industrie* [1918] A. C. 239.]

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## CHAPTER XIV.

## THE CONTRACT OF GUARANTEE (OR OF SURETYSHIP).

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*Definition.*—The contract of guarantee (or of suretyship) arises when one person (the ‘surety’ or ‘guarantor’), usually having otherwise no direct legal interest in, or connection with, the matter, promises a second person (the ‘principal creditor’) to be responsible to him in the event of a third person (the ‘principal debtor’) failing in the discharge of some primary liability incurred or to be incurred by him towards the principal creditor. Thus three persons are essential, viz., the creditor, the debtor, and the surety; the debtor must be or must become, and must remain, primarily liable to the creditor, while the surety must become liable to pay the creditor only secondarily, and conditionally upon the debtor’s default. For instance, S. says to C.: “If you will supply goods to D. on credit, I will pay you, if he does not.” The obligation of suretyship or guarantee must be carefully distinguished from two somewhat similar cases, viz., (1) cases in which one person undertakes towards a second the primary liability in respect of an obligation contracted for the benefit of a third; for instance, A. says to B.: “Please supply goods to C. upon his order to the value of £5 and debit them to my account”—that is sale of goods, not guarantee; and (2) cases in which one person, commonly having some prior legal interest in the matter, merely undertakes to indemnify another

against some liability or risk. For instance, A. is B.'s *del credere* agent, and undertakes, in return for a commission paid to him by B., to be responsible for the solvency of the purchasers to whom he, as B.'s agent, sells B.'s goods; or again, A. is a 'half commission man' employed by B., a stockbroker, on the terms that A. receives one half of the commissions received by B. upon the business of clients introduced by A., and that A. pays B. one half of any losses incurred by B. in respect of A.'s clients. In both these transactions, A.'s promise to be responsible to B. has been held not to be guarantee or suretyship, and is usually termed an 'indemnity' (*Sutton v. Grey* [1894] 1 Q. B. 285). But what matters is the substance of the transaction; and the use of the word 'guarantee' or 'indemnify' is not conclusive.

*Form.*—Section 4 of the Statute of Frauds provides, that no action shall be brought "whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person," unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him lawfully authorised. The writing must, as we have seen (pp. 28–29), contain all the terms of the contract; excepting that, by the Mercantile Law Amendment Act, 1856, no such promise is now to be invalid to support an action, by reason only that the consideration for the promise does not appear, either in the writing or by necessary inference from the written document. But, of course, whenever such contract is a simple contract, *i.e.*, not under seal, or of record, it must have a consideration in fact.

Towards the end of the eighteenth century, in the well-known case of *Pasley v. Freeman* (1789) 3 T. R. 51,

it was decided, that the Statute of Frauds did not prevent an action of *tort*, founded on deceit, from being brought successfully in respect of representations as to the character, conduct, credit, ability, trade, or dealings of a person to whom credit was to be given on the faith thereof; with the result that the provision of the statute for the protection of persons in the position of sureties was frequently evaded. Accordingly, it was afterwards further enacted by the Statute of Frauds Amendment Act, 1828 ('Lord Tenterden's Act'), that "no action shall be brought  
 "whereby to charge any person upon, or by reason  
 "of, any representation or assurance made or given  
 "concerning or relating to the character, conduct,  
 "credit, ability, trade, or dealings of any other person,  
 "to the intent or purpose that such other person may  
 "obtain credit, money, or goods upon (*sic*), unless  
 "such representation or assurance be made in writing,  
 "signed by the party to be charged therewith."

The result of these enactments is that, at any rate when the sole object of the promise is a liability to answer for the debt, default, or miscarriage of another, the promise must be in writing. The distinguishing features of the contract of guarantee, referred to above in defining it, have mainly been emphasised in cases upon this provision of the Statute of Frauds; and some of them are possibly more relevant in deciding whether or not a promise falls within that statute and must be in writing, than in deciding whether or not it ought to be termed a guarantee.

*Not strictly uberrimæ fidei.*—The contract of guarantee is not, in the strict sense, a contract *uberrimæ fidei*, i.e., a contract in the negotiation of which the law imposes upon one or both of the parties a duty to disclose to the other all the material facts in his possession; nevertheless any material misrepresentation to, or

fraudulent concealment from, the surety will entitle him to avoid his liability. But a 'fidelity guarantee' is in the nature of an insurance; and therefore, where an employer, on taking a bond from another, whereby the latter undertook to become responsible as surety for the fidelity of the servant, failed to disclose to the surety the fact, which was known to the employer but not to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer was not able to enforce the bond in respect of the servant's subsequent dishonesty, even though the non-disclosure was not fraudulent (*L.G.O. v. Holloway* [1912] 2 K.B. 72). For insurance is essentially a contract *uberrimæ fidei*.

*Discharge of surety.*—A surety will be discharged: (1) if the principal debtor be released by the principal creditor, or if the debt or demand be by any means extinguished as between the two principals. For the surety's obligation, being collateral only, cannot survive the liability of the principal debtor himself. The surety will also be discharged: (2) if the original risk be substantially altered by the principals to the transaction without the surety's consent; or (3) if the principal creditor, before obtaining judgment against the surety, and without the surety's permission, makes a binding contract to give time to the debtor; unless (by a somewhat anomalous rule) the principal creditor expressly reserves his rights against the surety, which has the effect of preserving unimpaired the surety's right to be indemnified by the principal debtor; or (4) by any other act or omission by the principal creditor which prejudices the surety. But the application of all these rules may be, and often is, largely varied or excluded by the contract between the surety and the creditor. And a guarantee for the payment of the principal and interest of a company's debentures



may be in the nature of a contract of insurance as well as a guarantee, and will not in such a case be destroyed by the disappearance of the debt. Nor is a guarantee of the interest due under debentures put an end to by the dissolution of the company ; though a surety's liability to pay interest due upon a mortgage "so long as any principal money remains due," was held to be terminated upon the bankruptcy of the principal debtor.

*Continuing guarantee.*—A contract of guarantee which relates to a series of transactions between the principal creditor and the principal debtor, whether or not the period of time is limited, is called a 'continuing guarantee.' An offer to guarantee a person may, of course, be revoked before it is accepted ; and a continuing guarantee is, in the absence of a contrary intention, regarded as a series of offers, each of which is accepted by the principal creditor as soon as, *e.g.*, he advances money to the principal debtor upon the faith of it, and any or all of which, while still unaccepted, may be revoked by due notice to the principal creditor. From this rule, however, must be excepted the cases in which, upon the true construction of the guarantee, the whole consideration moving from the principal creditor, *e.g.*, admission to membership of the corporation of Lloyd's, is given once and for all at the beginning ; in which cases the continuing guarantee is irrevocable, so long as the guaranteed relationship between the principal creditor and debtor continues. And it binds the estate of the surety after his death.

By the Partnership Act, 1890, it is provided, that a continuing guarantee given to a firm, or to a third person in respect of the transactions of a firm, is (in the absence of agreement to the contrary) revoked as to future transactions by any change in the constitution of the firm.

*Position of the surety.*—The law moreover implies, in favour of the surety, a promise on the part of the principal debtor to reimburse and indemnify him—as well principal as interest—for any payment which he is obliged to make under the guarantee. And where two or more persons have become co-sureties in respect of the same debt or demand, whether by the same instrument of guarantee or by different ones and at different times, and whether each was aware that the other or others were also co-sureties with him or not, any one of them who pays more than his rateable proportion, is entitled, in general, subject to any express agreement excluding or qualifying the right, to obtain contribution for such excess from the other co-sureties; while, if one of the co-sureties becomes insolvent, the contribution of the others is increased by his share. This right of contribution is available for the surety even before payment by him; if a judgment for the amount has been obtained against him.

Again, when the principal debt becomes ascertained and due, the surety may apply to the Court to compel the principal debtor to pay it off, and so to relieve him from any continuing liability; or he may himself pay the principal creditor, and then sue the principal debtor for reimbursement.

*Subrogation.*—Finally, where the surety is himself obliged to make the payment, he is entitled, under the principle of subrogation, to stand in the shoes of the principal creditor against the principal debtor, and to have an assignment of every judgment, specialty, or other security which the principal creditor holds in respect of the debt, and to stand in the place of the principal creditor in respect of every such judgment, specialty, or other security, both as against the principal debtor and as against any co-surety. The right of a

surety to the benefit of a collateral security does not remain in abeyance till he is called on to pay, but may be enforced at any time after the principal debt becomes due.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Smith, "*Mercantile Law*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Birkmyr v. Darnell* (1705) 1 Salk. 27 ; 2 Smith's *Leading Cases*.

*Mountstephen v. Lakeman* (1870) L. R. 5 Q. B. 613.

*Sutton v. Grey* [1894] 1 Q. B. 285.

*Guild v. Conrad* [1894] 2 Q. B. 885.

*Offord v. Davies* (1862) 12 C. B. N.S. 748.

*Lloyd's v. Harper* (1880) 16 Ch. D. 290.

*London General Omnibus Co. v. Holloway* [1912] 2 K. B. 72.

*Dering v. Lord Winchelsea* (1787) 1 Cox 318.

*Wolmershausen v. Gullick* [1893] 2 Ch. 514.

*Statute of Frauds*, 1677, s. 4.

*Statute of Frauds Amendment Act*, 1826.

*Mercantile Law Amendment Act*, 1856, ss. 3, 5.

"*Digest of English Civil Law*," pp. 290-302.]

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## CHAPTER XV.

## THE CONTRACT OF LOAN OF MONEY, AND BONDS.

THE contract for the loan of money (which was called *mutuum* by the Roman lawyers, in order to distinguish it from the *commodatum* already spoken of) differs from the ordinary contract of bailment, inasmuch as the actual coins or paper notes which form its subject are not to be re-delivered *in specie* to the lender, or disposed of according to his direction, but are to be applied to the use and according to the wishes or the necessities of the borrower; the borrower furnishing later to the lender an equal sum by way of repayment. In addition to repayment, there is commonly paid an increase, by way of compensation for the use of the sum advanced; which increase is called *interest*. For many centuries, the practice of taking interest for the loan of money was regarded in England, mainly on biblical grounds, as of doubtful morality; and the rate of interest was strictly limited by statute from time to time, all interest beyond the legal limit being prohibited as *usury*.

But the laws against usury being found to impose inconvenient restraints upon the price of money, and being believed at the same time not to afford any real protection to improvident borrowers, it was enacted by the Usury Laws Repeal Act, 1854, that all the existing laws against usury should be repealed. The repeal of the usury laws has in no way interfered with the right to be relieved, on equitable grounds, against



“catching bargains made with expectant heirs.” and other exorbitant or iniquitous transactions; and recently the legislature has to some extent reverted to the policy of the earlier statutes by enacting the Money-lenders Acts, 1900 and 1911. Under these Acts, the Court may, even in cases not falling within the principles upon which a court of equity would have given relief, reopen and relieve against ‘harsh and unconscionable’ transactions, in which the Court is satisfied that the interest or other charges are excessive; having regard, amongst other circumstances, to the risk being run by the money-lender, and the profit which he would make as the result of the transaction. And it is for the judge, and not for a jury, to decide whether or not a transaction is harsh and unconscionable, and whether or not the interest or other charges are excessive. The relief given is usually upon the footing of ordering the debtor to repay only the amount actually advanced, together with interest at a rate which is reasonable in the circumstances, say, ten or twenty per cent. or, not infrequently, more. Moreover, the Act of 1900 requires every money-lender, under penalties, to register himself in accordance with its provisions; and a money-lender cannot make any valid agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of such business, otherwise than in his registered name, which has been judicially interpreted to mean “in a name ‘other than his registered name,’ thus not making void a bill of exchange endorsed to him in blank. A loan of money by an unregistered money-lender who ought to be registered, is illegal and void. And he cannot recover the money nor enforce any security in respect of it. The borrower cannot recover from the money-lender in an equitable action a security given in respect of

the loan without repaying the amount of the loan. The amending Act of 1911, however, provides that agreements with, and securities taken by, a money-lender, and payments made on the faith of such agreements or securities, shall, in favour of a *bonâ fide* assignee or person paying without notice of a defect due to the operation of this provision of the Act of 1900, be deemed to be valid, but that the money-lender shall be liable to indemnify the borrower or other person who is prejudiced by virtue of the amending enactment. A person who is himself a money-lender cannot, however, rely upon this enactment, if he deals in securities in fact given to an unregistered money-lender.

The Acts apply only to transactions with *money-lenders*, i.e., persons whose 'business' (a word which "imports the notion of system, repetition, and continuity") is that of money-lending, or who hold themselves out in any way as carrying on that business, or make a regular practice of lending money. It does not apply to a transaction with a person who *bonâ fide* carries on some other business, although he may lend money in the course of it; provided that the money-lending is subsidiary and ancillary to the other business. No person can be registered as a money-lender under any name including the word 'bank,' or under any name implying that he carries on banking business; and a money-lender renders himself liable to penalties, if, in the course of carrying on the money-lending business, he issues any circular or statement containing expressions which might reasonably be held to imply that he carries on banking business. It is not lawful for a money-lender to register himself in more than one name; if through error he has been permitted to register himself under two or more names, contracts made in either registered name are valid, but the money-lender incurs penalties for so

carrying on business in more than one name. He must also register his business address or addresses, and incurs penalties if he carries on business elsewhere. Moreover, a transaction carried out elsewhere, even though it be an isolated one, is void.

*Bottomry and respondentia.*—There are two kinds of loans, not so common in their occurrence now as formerly, which, on account of the hazard involved, were not subject to the laws against usury, viz., bottomry and respondentia bonds. A *bottomry bond* is given when the owner of a ship borrows money on it to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro tota*) as a security for the repayment. The hypothecation may include the freight and cargo as well as the ship itself. This pledge may be given, and a valid contract of bottomry entered into, also by the master of the vessel, in a case of absolute necessity, and to the extent only of the necessity. It is one of the terms of this contract of bottomry, that, if the ship be lost, the lender loses also his whole money; but that, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon. Which premium or interest, though very high, has always been allowed, by reason of the extraordinary hazard run by the lender. A *respondentia bond* (which in other respects resembles a bottomry bond) extends only to the goods and merchandise, and may be enforced against the cargo-owner to the extent of the value of the cargo. Both bottomry and respondentia bonds give rise to maritime liens, which are enforced in the Admiralty Court of the Probate, Divorce, and Admiralty Division (pp. 620–621).

It should also be mentioned here, that the contract between a banker and his customer is in its essence a contract for the loan of money by the customer to

his banker, with certain superadded obligations ; but this contract has already been described at some length (pp. 148–152).

### BONDS.

*General nature.*—Bonds are a kind of contract (formerly in very extensive use), being adopted in a great variety of cases, where the object is to secure either the payment of money, or else the performance of, or abstention from, some act ; but they now have only a limited sphere of operation. A bond is an instrument under seal, whereby the obligor obliges himself to the obligee to pay a certain sum of money on a day, or on the happening of an event, specified.

Bonds which merely promise the payment of money are called *single bonds*, *e.g.*, a promise under seal to pay £100 on a certain day. But a *double bond* (or a *bond with a condition*) consists of two parts, (i) the obligatory part (*i.e.*, a promise to pay a sum of money) and (ii) the negative condition, or condition subsequent, upon the happening of which the obligatory part is defeated and becomes void (*i.e.*, if the obligor does, or abstains from doing, some particular act, “the obligation shall be void, or else shall remain in “full force”). In these cases, the sum mentioned in the obligatory part of the bond is a penal sum or penalty, sufficient to cover any possible damage arising from the breach of the condition. The nature of the condition will in each case depend upon the particular object intended to be secured ; and when the condition secures the payment of a sum of money by an obligation to pay a larger sum if default is made (*e.g.*, a promise under seal to pay £1000 a year hence, but if the obligor shall before then pay £500 then his promise to pay £1000 shall become void), the bond is called a *common money bond*. Or the object secured by the bond may be the fidelity of a servant or the



faithful performance by a third person of the duties of an office. Whatever the condition was, in case it was not performed, the bond became forfeited at law, and the obligation absolute and enforceable.

*Impossibility of condition.*—If the condition of a bond be impossible at the time of making it, or be uncertain, the condition alone is void, and the bond stands single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. On the other hand, where the condition of a bond was possible at the date of the making of the bond, and afterwards becomes impossible, either through the act of God, or by reason of the conduct of the obligee, in either of these cases the bond is avoided, and the obligor is discharged from all liability; because no prudence or foresight on his part could have guarded against such a contingency.

*Unlawfulness of condition.*—If the condition be to do a thing that is or becomes unlawful, the whole bond is void, in accordance with the principles we have already examined (p. 43). And the effect will be the same, even though the condition be *ex facie* lawful; if the bond was in reality given upon an unlawful consideration, or if it be to effect an unlawful object which the condition does not disclose. For though, by the general rule of law, the parties to a deed are in general estopped from assigning to it any intent beyond that which appears on the instrument itself; yet an exception is permitted in this case, upon the obvious ground of public policy. But if the bond have several conditions, some of which are lawful and others unlawful, and the several conditions are of a nature entirely distinct from, and not dependent upon, each other, the general rule is, assuming the consideration, if any exist, to be lawful, that the unlawful conditions only shall be void, and the bond

shall continue in force subject only to the lawful conditions.

*Sum recoverable on forfeiture.*—On the forfeiture of the bond, the whole penalty was formerly recoverable at law. But courts of equity would not permit a man to acquire any collateral advantage from the bond—as, *e.g.*, to take more than his principal, interest, and costs, where the bond was conditioned for the payment of money ; or (in some cases) to recover more than the amount of the damage actually sustained, where the bond was conditioned for the performance of, or abstention from, some act. With respect to common money bonds (p. 260), this principle of equity was in due course introduced into the practice of the courts of law ; and such practice was afterwards confirmed by a statute, 4 & 5 Anne (1705) c. 16, s. 13. In the case of such bonds, a claim can be made by specially indorsed writ under Order III., rule 6, of the Rules of the Supreme Court ; and the plaintiff can obtain judgment under Order XIV. (pp. 491–493). On the same equitable principle, with respect to bonds conditioned for the performance of any covenants or agreements in any deed or writing, it was enacted by the statute 8 & 9 Will. III. (1696) c. 11 (the provisions of which Act were recognised and preserved by the Common Law Procedure Act, 1852, and are adopted into the present practice under the Judicature Acts), that in every action upon a bond of that character, the jury shall inquire of the damages which the plaintiff has actually sustained from the breach of the condition ; and though (for his better security in the event of any future breach) he is still in such a case allowed to enter up judgment for the whole penalty, yet he is prevented from taking out execution to a larger amount than the damages which the jury had assessed. But the statute 8 and 9 Will. III., c. 11, has no application to bonds conditioned

for the performance of, or abstention from, any act not forming the subject of a covenant or agreement in writing, *e.g.*, to a bond whereby the obligor promised to pay £100 if he committed a breach of an injunction ; nor does equity in such cases (apart from the case of money bonds) necessarily give any relief.

Contracts secured by penalties are of an analogous character ; being agreements to do or abstain from doing certain acts, and providing that, in the event of breach, the promisor shall pay to the promisee a sum of money. Upon contracts of this nature, the question commonly arises, whether the sum shall be considered as a penalty, or as liquidated damages. This is a distinction of considerable importance ; because, if the sum is a penalty, then the promisee is permitted to recover no more than the amount of the damages which the jury shall have assessed. But if the sum is liquidated damages, he is entitled to recover the entire sum ; the parties themselves being in that case deemed to have settled and agreed the damages. We have already considered (pp. 84–86), in discussing the remedy of an action for damages for breach of contract, the rules which guide the courts in determining in any particular case whether a given sum is a penalty or is liquidated damages.

#### NOTE ON AUTHORITIES.

[The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Bonnard v. Dott* [1906] 1 Ch. 740.

*Chapman v. Michaelson* [1909] 1 Ch. 238.

*Whiteman v. Sadler* [1910] A. C. 514.

*Cornelius v. Phillips* [1918] A. C. 199.

*Collins v. Blantern* (1767) 2 Wils. 341 ; 1 *Smith's Leading Cases*.

*Money-lenders Acts*, 1900 and 1911.

"*Digest of English Civil Law*," pp. 201–202 ; 987–988.]

## CHAPTER XVI.

## QUASI-CONTRACT.

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WE explained in the opening chapter of this Book (p. 2) that the broad distinction between obligations arising out of contracts, and obligations the breach of which is a tort, is, that the former are created by the parties themselves, while the latter are imposed upon persons by the law. There is, however, a third class which, though analogous to contractual obligations, is nevertheless imposed by law and not by the agreement of the parties, in circumstances in which it would be unjust, having regard to what has happened between them, for one person to retain or not to pay money or restore property to another. The obligations so imposed are said to arise from Quasi-Contract. In a case which, though it has been overruled as an application of the principles enunciated in it to the particular facts, is still regarded as a leading case (*Moses v. Macferlan* (1760) 2 Burr. at p. 1012), the great Lord Mansfield said: "This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies only for money which *ex æquo et bono* the defendant ought to refund." A few lines later he gave some illustrations: "it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion or oppression, or an undue advantage taken of the plaintiff's situation, contrary



“to laws made for the protection of persons under those “circumstances.” But this is very far from saying, as an examination of the cases now to be mentioned will show, that whenever one person holds money which, ethically speaking, he ought to pay to another, the courts will compel the payment.

Quasi-contracts are sometimes called ‘constructive contracts,’ that is, contracts which are not actual but are construed or deemed by the law to arise from the relations of the parties. (A similar use of the word ‘constructive’ has already been noticed in the case of ‘constructive notice’ in Vol. II., pp. 402–403, and ‘constructive total loss,’ on p. 202 of this volume.) The use of this expression ‘constructive contracts’ makes it important to distinguish quasi-contracts from contracts, sometimes called ‘implied,’ sometimes ‘tacit,’ which are inferred from the conduct of the parties usually in the everyday affairs of life even when no words are spoken or written, for instance, stepping on to an omnibus. These latter are real, actual contracts created by the intention of the parties, differing mainly from the oral or written contract in this respect, that the parties, instead of giving oral or written expression to their intentions, have left them to be inferred. (It should, however, be mentioned that some writers use the term ‘implied’ to cover this kind of contract as well as quasi-contracts.)

It is clear from Lord Mansfield’s words, that he did not regard the law relating to quasi-contracts as a closed book ; nor is it so regarded to-day. With that warning, we may now proceed to single out a few of the many and multifarious sets of circumstances in which a quasi-contractual obligation is imposed by the law.

(i) *Money paid under a mistake of fact.*—The rules we are about to discuss are connected with the maxim : *Ignorantia juris excusat neminem ; ignorantia facti*

*excusat* ; but this is dangerously terse and simple, and requires amplification. Money paid by one person to another, under a mistaken belief due to ignorance or misapprehension of the relevant facts of the case, is recoverable by action from the recipient ; unless, (a) the money was recovered under the pressure of *bonâ fide* legal proceedings, or (b) the party making the payment has expressly waived enquiry into the facts. Thus, when a company paid directors' fees to a person who was erroneously believed to be still a director, but whose office had in fact become automatically vacated, the money was recovered by the company as money paid under a mistake of fact (*Re Bodega Limited* [1904] 1 Ch. 276). But if that person had instituted *bonâ fide* legal proceedings against the company to obtain his fees and the company had made a payment of money to him in satisfaction of his claim, the company could not have subsequently recovered that sum, whether it had been paid under a mistake of fact or in order to put an end to the proceedings. *A fortiori*, if judgment is obtained against a person and he satisfies the judgment by a payment of money, he cannot recover the sum paid when he discovers later some evidence, *e.g.*, a receipt for a previous payment to the plaintiff of the amount claimed, which would have enabled him to defeat the action ; and in this case the principle appears to rest upon the estoppel created by a judgment, and upon the maxim : *Interest reipublicæ ut sit finis litium* (*Marriot v. Hampton* (1797) 7 T. R. 269 ; 2 Smith's Leading Cases). And a person who, when making a mistaken payment, waives enquiry, for instance, by stating that he is satisfied as to the accuracy of the facts upon which the claim made upon him is based, and that he has no desire to verify them, is unable subsequently, upon discovering the mistake, to recover the sum paid. As we have already seen (p. 56), the word *jus*, in the

maxim quoted at the beginning of this paragraph, means the ordinary law of the country ; and a mistake as to private rights of ownership is treated as a mistake of fact, not as a mistake of law.

On the other hand, money paid under a mistake of law is not recoverable by action from the recipient. In very self-defence the law must adopt this rule ; for as Lord Ellenborough, C.J., said in *Bilbie v. Lumley* (1802) 2 East, at p. 472, “every man must be taken “to be cognizant of the law, otherwise there is no saying “to what extent the excuse of ignorance might not be “carried. It would be urged in almost every case.” So in that case an underwriter, who paid a claim upon a policy of insurance, was unable to recover the amount paid by him ; for, when he paid it, he had by law a right to repudiate the policy because of the concealment of a material fact from him when the insurance was effected. But the statement that money paid under a mistake of law is not recoverable requires at least three modifications.

(a) It being the duty of the courts of law to set a good example, an officer of the court, *e.g.*, a trustee in bankruptcy or a liquidator, to whom money is paid under a mistake of law, will be ordered by the Court to refund it to the person entitled to it.

(b) Where the mistake of law is induced by the fraud of the recipient of the money, *e.g.*, the fraudulent statement of an insurance company’s agent that a certain policy of insurance is legal when in fact it is not (as the agent well knows), the sum paid may be recoverable, not on the ground of mistake of law but by reason of the fraud.

(c) There are cases on record in which a Court of Equity has granted relief on the ground of a mistake of law in circumstances not falling within the two previous paragraphs (a) and (b), for instance, where there is a fiduciary relationship between the parties.

(ii) *Money paid under an unlawful agreement* is as a general rule not recoverable : *in pari delicto potior est conditio possidentis*. But (a) until the unlawful agreement has been carried out, the object of the law in discouraging and preventing unlawfulness is advanced by allowing to either party to the agreement a *locus pœnitentiæ* : and a party who has paid money or delivered goods with some unlawful purpose in view may, so long as the unlawful purpose has not been carried out, recover the money so paid or the goods so delivered. And (b) even where the unlawful purpose has been carried out, a party who is *in minori delicto*, that is, the less guilty of the two, is allowed in certain circumstances to recover money paid or goods delivered by him, either (1) on the ground that he has been coerced into the unlawfulness, *e.g.*, an embarrassed debtor who is coerced by one creditor into the commission of a fraud upon the other creditors ; for as Lord Ellenborough, C.J., said in *Smith v. Cuff* (1817) 6 M. and S. at p. 165, “it can never be predicated as “*par delictum* when one holds the rod and the other “bows to it” ; or (2) on the ground that he is a member of a class which a statute rendering the agreement unlawful is designed to protect, *e.g.*, a member of the public who has been induced to subscribe to an illegal lottery may recover his subscription before (and possibly even after) the fund has been distributed.

In the circumstances thus summarised in which money or goods may be recovered, the action rests, clearly not on the contract, but on quasi-contract.

(iii) *Money obtained by extortion and under protest*.—Akin to the grounds of recovery discussed in the previous paragraph is the rule that “if a person pays “money which he is not bound to pay, under the “pressure of urgent and pressing necessity, or of “seizure, actual or threatened, of his goods, he can “recover it as money had and received” (per Lord



Reading, C.J., in *Maskell v. Horner* [1915] 3 K. B. at p. 118). Instances of this so-called 'duress of goods' are the payment under protest of market tolls not legally due, or of an overcharge as the only means of getting a railway company or other carrier to carry your goods, or as the only means of inducing a carrier to deliver goods which have arrived at their destination.

(iv) *Money paid, the consideration for which has totally failed.*—"It is a well-established principle of "the English Common Law," said Viscount Haldane in *Royal Bank of Canada v. Rex* [1913] A. C. at p. 296, "that when money has been received by one person, "which in justice and equity belongs to another, under "circumstances which render the receipt of it a receipt "by the defendant to the use of the plaintiff, the latter "may recover as for money had and received to his "use. The principle extends to cases where the "money has been paid for a consideration that has "failed." Thus, if a purchaser of goods pays the price, and the vendor then fails without lawful excuse to deliver them, the purchaser has an action on a quasi-contract to recover the price paid by him, on the ground that the consideration for that price has not been forthcoming. But "where a sum of money "has been paid for an entire consideration, and there "is only a partial failure of consideration, neither the "whole nor any part of such sum can be recovered." Thus, where a premium was paid in consideration of an apprenticeship for a period of six years, and the master died at the end of the first year, an action to recover the premium did not succeed. Sometimes, however, the consideration is not entire but is severable, e.g., when 4000 bushels of wheat are bought and paid for, and only 2000 bushels are delivered which the buyer accepts; in such a case the buyer can recover half the price paid by him as money paid for a consideration which has failed.

Of the many other sets of circumstances in which the law will impose upon one person a quasi-contractual liability to pay or to repay money to another, it will suffice to mention *quantum meruit* (pp. 86–87), account stated, and liability upon a judgment.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of this subject, the student should refer to “*Digest of English Civil Law*,” pp. 315–325 ; and to the *Notes to Marriot v. Hampton*, in 2 *Smith’s Leading Cases*.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Moses v. Macferlan* (1760) 2 *Burr.* 1005.

*Marriot v. Hampton* (1797) 7 *T. R.* 269 ; 2 *Smith’s Leading Cases*.

*Bilbie v. Lumley* (1802) 2 *East*, 469.

*Taylor v. Chester* (1869) *L. R.* 4 *Q. B.* 309.

*Smith v. Cuff* (1817) 6 *M. and S.* 160.

*Maskell v. Horner* (1915) 3 *K. B.* 106.]

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## PART II.

### OBLIGATIONS ARISING FROM TORTS.

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#### CHAPTER XVII.

##### GENERAL PRINCIPLES.

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*Definition.*—Having dealt with the obligations which persons create for themselves by contracts, and those similar obligations known as Quasi-Contracts which the law deems to arise from the relations between two persons and deals with upon the analogy of contracts, we now turn to consider Torts. A tort may be defined as *a breach of a duty created by the law alone, for the redress of which an action for damages may be brought by the party injured.* On the one hand, it must be distinguished from a breach of a contractual or quasi-contractual obligation; on the other, its distinctive remedy differentiates it from a breach of trust, which has its own equitable remedies, and from a crime, whereof the remedy is aimed chiefly at the punishment of the wrongdoer rather than at the compensation of any person injured. But certain acts may be at once breaches of contract, torts, and crimes; for instance, larceny by a carrier to whom goods have been entrusted for carriage. (The word ‘tort’ is derived from the Latin *torquere*, to twist, *tortus*, twisted, as opposed to *rectus*, straight or right.)

Historically, the Law of Torts consists of the law

relating to a number of different causes of action, *e.g.*, Trespass, Detinue, Trover or Conversion, Replevin, Trespass on the Case ; and although it may be true, as some hold, that the Law of Torts is approaching a stage at which it will be possible to find one or more general bases of liability, yet at present the most satisfactory method of treating the subject, within the limits here assigned to it, is to enumerate the principal specific torts recognised by the law, and examine the conditions governing each of them. There are, however, certain general characteristics of liability in tort, and of immunity from liability for what is *primâ facie* a tort, to which we shall first draw attention.

*When actual damage is essential.*—It might have been supposed that it was essential, to constitute a tort, that the injured party should be able to point to and prove some actual damage sustained by him ; but this is very far from being always the case. The various rights, infringements of which are torts, are for this purpose capable of division into : (i) *absolute rights*, the mere infringement of which, damage or no damage, are torts ; and (ii) *qualified rights*, that is, rights merely to be preserved from loss or damage by certain unauthorised acts or omissions of other persons. Thus every man has an absolute right to personal safety, which may be infringed by *assault* and *battery* ; to personal freedom, which may be infringed by *false imprisonment* ; to reputation, which may be infringed by the publication of a *libel* or by certain kinds of *slander* (though, as we shall see later, in other kinds of slander actual damage is an essential ingredient) ; to the exclusive and undisturbed possession of his land or chattels, which may be infringed by any act amounting to a *trespass* to land or goods, or a *conversion* or *detention* of goods. For the infringement of any such right he is entitled at Common Law



to bring an action for damages (although he may not in fact have suffered any loss or inconvenience from the act complained of), and to recover at least nominal damages. These torts are said to be ‘actionable *per se*,’ that is, without proof of actual damage ; and they are sometimes referred to as cases of *injuria sine damno*, that is, legal wrong without actual damage.

On the other hand, there is a large number of unauthorised acts and omissions which are not actionable unless they cause actual damage. Thus, in an action for breach of a duty to exercise care (commonly called an ‘action founded on *negligence*’) the plaintiff must prove that, by reason of the negligent act or omission complained of, he has suffered some actual loss or injury, as the natural and probable consequence of it. He will fail in the action if he has not sustained any damage, or if the loss or injury suffered is not such as would, in the ordinary course of events, naturally and probably flow from the negligence complained of ; in which case the damage is said to be ‘too remote.’ So, in an action of *deceit*, the plaintiff must show that he acted on the fraudulent misrepresentation of the defendant, and thereby suffered loss. In these actions, and also in actions for nuisance not amounting to a trespass, for maintenance, for seduction, and in many actions of slander, damage is an essential part, or the ‘gist,’ of the action ; and the right of action accrues from the date of the damage, and not from the date of the act which has caused it.

*Damnum sine injuria*.—It should, however, be noted, that the mere causing of actual damage to another is not necessarily a tort. The damage must be the natural and probable consequence of the infringement of some right recognised by the law ; otherwise it is said to be *damnum sine injuria*, for which no action can be maintained. Two groups of cases will illustrate this principle. (i) Every person has

a right to carry on his own trade or profession in competition with others ; even though his competition may cause damage to his rivals. Thus in the *Gloucester Grammar Schools Case* (Y. B. 11 Hen. 4, fo. 27, pl. 23 ; Kenny, *Cases on the law of Tort*) in the year 1411, it was decided that no action lay at the suit of one schoolmaster against another who established a school in the same town and thereby reduced the plaintiff's profits ; and in *Mogul Steamship Co. v. McGregor, Gow & Co. and others* [1892] A. C. 25, the House of Lords held that damage done to a rival by a combination of traders in their desire to obtain a monopoly of a particular trade was not actionable, although the probable effect of the means of competition employed by them would be to drive their rival out of the trade.

(ii) Similarly, when an owner of land does something on his land which he has a legal right to do, he is not answerable for damage which his neighbour may thereby suffer. Thus in *Chasemore v. Richards* (1859) 7 H. L. C. 349, the House of Lords held that a landowner is not liable to an action for damages for digging a well on his own land, although the effect of it is to deprive his neighbour of percolating water which he would otherwise get ; nor (unless his neighbour has received an express grant or covenant of a right of prospect) for erecting a building which shuts out his neighbour's view of the landscape ; nor for allowing thistles to grow on his land, the seeds of which are carried by the wind on to his neighbour's land (*Giles v. Walker* (1890) 24 Q. B. D. 656).

*Bad motives : malice.*—In general, an act which is lawful does not necessarily become actionable because done from a bad motive or inspired by malice. Thus in *Mayor of Bradford v. Pickles* [1895] A. C. 587, it was held that the damage done to adjoining water-works by the act of a landowner in sinking a well on his land and intercepting water which would otherwise

have percolated through to the adjoining waterworks was not actionable; even though it were done maliciously, with the intention of compelling the owners of the water-works to buy out the landowner. "If it was a lawful act," said the Earl of Halsbury, "however ill the motive might be, he had a right to do it. . . . Motives and intentions in such a question . . . seem to me to be absolutely 'irrelevant.'" But there are cases in which an act causing damage may be lawful if done without malice, which would be actionable if done maliciously. Many attempts have been made to define 'malice'; for legal purposes it need not involve as much as it does in its popular sense of 'spite,' 'actual ill-will.' Sometimes it means simply 'wrongful intent.' But for our present purposes something more, some 'improper motive,' is intended by the term. In certain torts, malice is an essential ingredient; thus it is not actionable to institute groundless and unsuccessful criminal proceedings against a person, unless there be both malice and an absence of reasonable and probable cause; and the defence of qualified privilege, when raised to an action for libel or slander, may be rebutted by proof of malice.

*Good motives.*—In the case before referred to (*Mayor of Bradford v. Pickles, supra*), the Earl of Halsbury said: "If it was an unlawful act, however good his motive might be, he would have no right to do it." Thus, when a near relative of a recently deceased person removed some of the deceased's goods from one room to another, in all good faith and for their better preservation, he was nevertheless liable to the executors in Trespass when the goods were lost. And when a man, in order to avoid inconvenience and expense to a friend and former partner, and without any corrupt motive of gain, falsely asserted that he had his friend's authority to accept a bill of exchange

and did accept it *per procurationem*, he was nevertheless held liable in deceit to a subsequent holder, although he had no deceitful intention, and fully expected that his friend would ratify his acceptance. *A fortiori*, in many torts in which malice or improper motive is not a specific ingredient, a defendant whose motives are indifferent, neither good nor bad but merely neutral, may be held liable. Thus, when an auctioneer innocently and in the ordinary course of business sold, and delivered possession of, goods which the principal instructing him had no right to include in the sale, he was nevertheless held liable to the true owner of the goods in Conversion (*Consolidated Co. v. Curtis* [1892] 1 Q. B. 495).

*Remoteness of cause.*—Sir Francis Bacon wrote in his maxims : “It were infinite for the law to consider “the causes of causes, and their impulsion one of “another ; therefore it contenteth itself with the “immediate cause, and judgeth of acts by that, “without looking to any further degree,” which is a paraphrase of the maxim : *in jure non remota causa sed proxima spectatur*. This question of the remoteness of cause is important in the law of torts in at least three ways. (i) In torts wherein proof of actual damage is essential, the damage alleged must be the natural and probable consequence of the defendant’s act or omission. For instance, in an action founded on negligence, where the defendants’ vessel, owing to the negligence of their servants, struck on a sand-bank, and, becoming from that cause unmanageable, was driven by the wind and tide upon the plaintiffs’ seawall and damaged it, the defendants were held liable ; their servants’ negligence was the proximate cause of the injury. But in *Cox v. Burbidge* (1863) 13 C. B. N. S. 430, also an action founded on negligence, where the plaintiff, a child, was kicked by the defendant’s horse, which was straying on the highway, it was



held that this damage was too remote, it not being a natural and probable consequence of a horse being on the highway that it should kick a child, even if a breach of duty by the defendant to the plaintiff had been proved. (ii) In torts wherein proof of actual damage is not essential, that is, torts actionable *per se*, such as Trespass. Thus, in the famous squib case (*Scott v. Shepherd* (1773) 2 W. Bl. 892), the defendant threw into a crowded market-house a lighted squib which, after being bandied about by two persons acting not as free agents but “under a compulsive necessity for their own safety,” struck the plaintiff in the face and, bursting, put out one of his eyes. The question was, whether the injury was “the direct and immediate act of the defendant,” and arose “from the force of the original act of the defendant, or from a new force by a third person”; and it was held that the injury was the natural and probable consequence of the defendant’s act, and that Trespass lay. (iii) In estimating the damages recoverable for a tort, whether the tort be actionable *per se* or only on proof of actual damage, the plaintiff is only allowed to recover such loss or damage as is the natural and probable consequence of the defendant’s tort. Thus in *Glover v. London and South Western Railway Co.* (1867) L. R. 3 Q. B. 25, the plaintiff was wrongfully removed from a railway carriage by the defendants’ servants, and recovered twenty shillings nominal damages for the assault. He also claimed to recover the value of a pair of race-glasses left in the carriage, but failed, on the ground that such loss was too remote. But a man will be held liable for consequences foreseen or intended by him, which, though not natural and probable, do in fact result from his act; always supposing, of course, that the facts constitute a tort. And, indeed, a person is liable for the direct consequences of his negligent act,

even if he could not have reasonably anticipated them (*Polemis v. Furness, Withy & Co.* [1921] 3 K. B. 560).

*Joint tort-feasors.*—Where two or more persons commit a tort jointly, each is liable to be sued, either alone or together with the others, and each is liable for the whole of the damages that may be awarded. The Court or a jury may not split up the damages and distribute them over the defendants; and there must be one verdict for the whole amount against all of them, although no more than the whole amount can be recovered. Supposing that the plaintiff obtains payment from one of the defendants of the whole amount of the damages, or more than that defendant's proportionate share, the defendant who has paid cannot, in general, recover any contribution from his co-tort-feasors. The general rule is, that a tort-feasor who has been forced to pay damages for his tort cannot recover from any other person an indemnity against, or a contribution towards, the damages he has paid; the latter part of the rule, dealing with contribution, being often referred to as 'the rule in *Merryweather v. Nixan*' (1799) 8 T. R. 186; 1 Smith's Leading Cases. But this rule as to indemnity and contribution is qualified by a number of exceptions:—

- (i) when an act is done by one person at the request, or upon the instructions, of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be a tort against some third party (e.g., when an auctioneer sells, and delivers possession of, goods upon the instructions of a principal who had no right to sell them), the person committing the tort is entitled to an indemnity from the person who requested or instructed him to do the tortious act;

- (ii) by the Companies (Consolidation) Act, 1908, s. 84, co-directors and co-promoters who are sued for compensation in respect of untrue statements contained in a company prospectus have a right of contribution amongst each other as defined by the Act—a right which seems to extend even to damages recovered against them in an action of deceit at Common Law (*Gerson v. Simpson* [1903] 2 K. B. 197) ;
- (iii) the Maritime Conventions Act, 1911, gives a ship-owner a certain right of contribution against another ship-owner in respect of damages paid by the former, in excess of his proper share, for loss of life or personal injury caused by the fault of both vessels ;
- (iv) in certain cases, a right of contribution exists between partners in respect of a tort. (The right of contribution which in certain cases lies between trustees in respect of a breach of trust is outside the scope of torts.)

*Torts which are also breaches of contract.*—Frequently a wrongful act is both a tort and a breach of contract ; for instance, when a bailee wrongfully refuses to return goods which he has obtained under a contract, or when a surgeon whom I have engaged to operate upon me, does so negligently and causes me damage. In general, it does not matter whether the injured party sues in tort or on the contract ; and the measure of damages will be the same in both cases. But it may be material (i) on a question of costs, for the limits of the amounts recovered in High Court proceedings, below which a plaintiff is ordinarily entitled either to no costs at all or to costs only on the County Court scale, differ in the cases of tort and breach of contract (p. 677) ; (ii) in connection with the remitter of an action from the High Court to the County Court (pp. 679–680) ; (iii) in considering

whether a right of action survives to or against the personal representatives of the wrongdoer (pp. 294–298); and (iv) in the event of his bankruptcy (pp. 644–645). When it is material whether the plaintiff can succeed on contract or in tort, the rule is that: “if in order to make out a cause of action “it is not necessary for the plaintiff to rely on “a contract, the action is one founded on tort; “but, on the other hand, if in order successfully “to maintain his action, it is necessary for him to “rely upon and prove a contract, the action is one “founded upon contract.” But in two cases this rule must give way to other considerations; for, when “the cause of action is in substance *ex contractu*, or “is so directly connected with the contract that the “action would be an indirect way of enforcing it,” the law does not permit a person to frame his action in tort in order to render an infant liable in tort for what is really a breach of contract, or a husband liable—as for her tort—for what is really his wife’s contract made during marriage (pp. 287, 323).

*Torts which are also crimes.*—In many cases, the facts which give rise to an action of tort, also constitute a crime, *e.g.*, battery, libel, larceny, conversion, rape, and seduction; and, ordinarily, civil and criminal proceedings may be taken concurrently or successively. But (i) when the crime amounts to a felony (Vol. IV., pp. 5–10), no civil action for the tort can be brought against the offender by the person against whom the felony is committed, until a prosecution for the felony has taken place, and the Court will stay all proceedings in the civil action pending the prosecution; but this prohibition does not apply to a separate civil action brought by some person other than the victim of the felony, *e.g.*, a master suing for loss of the services of an injured employee, or to civil actions brought against some person other than the



offender, *e.g.*, his master in respect of a tort committed within the scope of the offender's employment. And (ii) by the Offences against the Person Act, 1861, ss. 42-45, if a person charged with assault before a court of summary jurisdiction is convicted, and suffers the punishment inflicted, or if the complaint is dismissed and he obtains a certificate of the dismissal, he is thereby released from a civil action in respect of the same assault, whether instituted by the prosecution or by any other person, *e.g.*, the husband of the person assaulted. But the conviction and punishment, or the acquittal, of a servant, does not release his master from a civil action, if the assault were committed within the scope of his employment.

*Torts committed abroad.*—The circumstances in which a tortious act done outside the jurisdiction of the English courts is actionable before them are discussed later (pp. 441-442).

#### EXEMPTIONS FROM LIABILITY IN TORT.

Following the method of extracting a few principles which are common to all or to a large number of torts before considering the specific torts in detail, there are several defences which must be noticed.

1. *Volenti non fit injuria.*—A consenting party cannot complain of legal wrong. We shall have particular occasion to examine this defence (sometimes called 'leave and licence') in dealing with the position of master and servant; but its application is much wider. If I voluntarily consent to be injured by you, or to run the risk of being injured by you, it would be unreasonable to allow me to recover damages from you. So, one footballer who is injured by another, without any breach of the rules of the game, cannot sue him for damages for assault; and a farmer who allows huntsmen to hunt over his land cannot sue them for trespass in respect of the damage ordinarily

incidental to hunting, unless it is an implied condition of his consent that he should be compensated. But consent to risk of damage means more than knowledge of the risk; the maxim is *volenti* (not *scienti*) *non fit injuria*. And it seems probable, that if a person voluntarily exposed himself to a criminal degree of harm, or to harm in the course of a criminal act, this maxim would not apply to defeat his action for damages; although he would probably fail for other reasons.

2. *Accident*.—In former days, the liability for acts which caused damage to others was more absolute than it has since become; and the law was less inclined to listen to excuses qualifying that liability. It is only within comparatively recent times that accident has been admitted, within limits, as a defence. If I am engaged in doing a lawful act in a careful manner, *e.g.*, driving a pair of horses along the road, or shooting pheasants, and you are injured as the result of an accident arising out of what I am doing, but which I could not by the exercise of reasonable care prevent, *e.g.*, my horses are startled by a dog and bolt on to the pavement and knock you down, or a pellet from my gun glances off a tree and injures you, I am not liable (*Stanley v. Powell* [1891] 1 Q. B. 86). ‘Inevitable accident’ (as this defence is sometimes termed) is not a happy expression, because I might have avoided the accident by not driving the horses or shooting at pheasants at all, or by taking such meticulous precautions as to reduce my driving or shooting to a virtual impracticability, and it is not necessary for me to prove as much as this. Again, mistake is not the same thing as accident. If I, in walking or riding on my own land, or on a public road, inadvertently cross your boundary, I am liable for trespass. I was on land which, through a mistake or defect in my

knowledge, happened to be land on which I had no right to go; but I went there intentionally, not accidentally. If, while walking on the public road, I am tossed into your field by a bull or by a passing motor-car, I am not liable for trespass; not on the ground of accident, but simply because there is no act, no volition, on my part.

3. *Defence of person or property.*—(i) *Of the person.*—If force is applied by you without lawful justification to me, or to my parent or child, or spouse, or master or servant, I am entitled to repel it by force, using only such amount of force as is reasonable and necessary for the purpose; but if my resistance exceeds the bounds of mere defence, I become the aggressor, and the plea of self-defence will not avail me if you bring an action against me for battery. And it is asserted by some authorities, that reasonable and necessary force may be used in defence of the person of a stranger. It seems that the plea of self-defence may in certain circumstances excuse what would otherwise be a tortious act, not only when by it injury is inflicted upon the aggressor, but even when other persons are injured. For instance, in the squib case already referred to (*Scott v. Shepherd, supra*), clearly if the lighted squib had been thrown back at the person who originally cast it into the market-house and had injured him, the person who threw it in order to get rid of it would have been able to plead self-defence against the original thrower. One Judge in that case speaks of the intermediaries who bandied the squib about as “acting under a compulsive “necessity for their own safety and self preservation,” and in self-defence; so that, possibly, had the plaintiff sued them, they could have pleaded self-defence, or, what is in effect the same, necessity in the exercise of self-defence. But this view is much disputed.

(ii) *Of land*.—I am entitled to use a reasonable and necessary amount of force to resist a person who wrongfully seeks to enter upon land of which I am in occupation, or to eject him when he is wrongfully upon it (*Harrison v. Duke of Rutland* [1893] 1 Q. B. 142). Moreover, I am entitled to protect my land from an anticipated danger which threatens it, such as a flood of water or a swarm of locusts, by building an embankment or beating off the locusts, even though the necessary consequence of my action is to divert the common enemy to your land. But, once the misfortune has arrived, and is on my land, I am not entitled then to transfer the misfortune from my land to yours; for instance, by piercing holes in my embankment, with the necessary consequence that the flood is transferred to your adjoining land (*Whalley v. Lancashire and Yorkshire Railway Co.* (1884) 13 Q. B. D. 131).

(iii) *Of personal chattels*.—It is probable that a reasonable and necessary amount of force may be used by me to prevent you from wrongfully taking my chattels personal from me, and even to enable me to recover them after they have been taken (*Blades v. Higgs* (1861) 10 C. B. N.S. 713).

4. *Public necessity*.—There is some authority for the statement that a *prima facie* tortious act may be justified by proof that it was necessary for the common weal, *e.g.*, erecting defences against invasion on the land of a private subject in time of war, or pulling down houses to prevent a fire from spreading. But, as these invasions of private property are usually the act of some public official, it will be more convenient to discuss the matter (together with ‘act of State’ and other defences resting on the official position of the defendant) in the later chapter (XXXIII.) on Proceedings by and against the Crown.



5. *Special statutory authority*.—An act which is *primâ facie* tortious may be justified by showing that it has been authorised by statute—a defence which is often available to local government authorities and public utility companies which have obtained special powers from the Legislature to enable them to perform services of general utility. In such a case, the validity of this defence will usually turn upon the construction of the statute, the terms of which may be absolute and, sometimes, imperative: “You shall or may do this at all costs”; or qualified and usually permissive: “You may do this, so far as you can do it without committing a tort.” (i) Where a defendant has absolute statutory powers to do what would amount to a nuisance or some other tort, he is not responsible (in the absence of negligence) if damage results from what the legislature has sanctioned. “Where,” said Lord Blackburn in *Metropolitan Asylum District v. Hill* (1881) L. R. 6 App. Ca., at p. 203, “the Legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the Legislature, would entitle any one to an action, the right of action is taken away.” But (ii) if the statutory powers conferred are merely permissive, *e.g.*, to build and maintain a small-pox hospital on a site where, and in a manner in which, that can be done without infringing the rights of others, and if they contain no express or implied exemption from ordinary liabilities, they must be exercised without infringing the rights of others. And it rests upon the defendant to rebut the presumption that the powers are merely permissive.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of this subject the student should refer to Sir Frederick Pollock's “*Law of Torts*” or Sir John W. Salmond's “*Law of Torts*.” Many of the cases referred to in the preceding

pages and below will be found in Professor Kenny's "*Cases on the Law of Tort*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Mogul S.S. Co. v. McGregor* [1892] *A. C.* 25.

*Mayor of Bradford v. Pickles* [1895] *A. C.* 587.

*Chasemore v. Richards* (1859) 7 *H. L. C.* 349.

*Kirk v. Gregory* (1876) 1 *Ex. D.* 55.

*Sharp v. Powell* (1872) *L. R.* 7 *C. P.* 253.

*Scott v. Shepherd* (1773) 2 *W. Bl.* 892.

*Glover v. London and South Western Railway Co.* (1867) *L. R.* 3 *Q. B.* 25.

*Polemis v. Furness, Withy & Co.* [1921] 3 *K. B.* 560.

*Merryweather v. Nixan* (1799) 8 *T. R.* 186 ; 1 *Smith's Leading Cases*.

*Adamson v. Jarvis* (1827) 4 *Bing.* 66.

*Turner v. Stallibrass* [1898] 1 *Q. B.* 56.

*Smith v. Selwyn* [1914] 3 *K. B.* 98.

*Stanley v. Powell* [1891] 1 *Q. B.* 86.

*Whalley v. Lancashire and Yorkshire Railway Co.* (1884; 13 *Q. B. D.* 131.

*Metropolitan Asylum District v. Hill* (1881) 6 *App. Ca.* 193.

"*Digest of English Civil Law*," pp. 326–345.]

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## CHAPTER XVIII.

## PARTIES TO AN ACTION IN TORT.

## INFANTS.

*Primâ facie*, an infant is liable in tort ; excepting that (i) where the tortious act is in substance a breach of contract, the infant is not liable in tort. Whether or not he will be liable on the contract will depend upon its nature and upon the considerations we have already discussed (see pp. 33-37). But (per Byles, J., in *Burnard v. Haggis* (1863) 14 C. B. N.S. 45) "the rule "is plain . . . as to . . . infants, that you cannot by "suing *ex delicto* (*i.e.*, in tort) change the nature and "extent of their liability." This rule of immunity applies so as to protect an infant who, by means of a fraudulent misrepresentation, has induced some person to contract with him, or who, by carelessness or otherwise in the course of the hiring, damages an article which he has hired. But where an infant expressly hired a mare merely for riding, and not "for jumping or larking," and then lent her to a friend who jumped and staked her, the fact that the infant had obtained the horse under a contract did not protect him in an action in tort by the livery-stable keeper. For the wrong was quite independent of the contract, "a bare trespass, not within the "object and purpose of the hiring" (*Burnard v. Haggis, supra*).

(ii) In certain torts it is necessary to prove a definite mental element, *e.g.*, malice or improper motive in

Malicious Prosecution, or in rebutting a defence of qualified privilege raised to an action of Libel or Slander, or intention to induce Deceit ; and in these cases it is contrary to common sense to hold that every infant, however young, can be made liable in tort. There is no hard and fast line as in the criminal law, which has established an irrebuttable presumption that an infant below the age of seven years cannot commit a crime ; but it is reasonable, though judicial authority is practically non-existent, to suppose that, in the case of such torts, when the defendant is an infant of tender years, his age should be taken into consideration in deciding whether the required mental element exists or not.

(iii) Both when infants are plaintiffs in actions of tort and when they are instruments, innocent or otherwise, in a chain of causation whereby the act or omission of one person has eventually resulted in the injury of another, the law is prone to recognise the natural instincts of small children and their inherent propensity towards mischief ; in fact, that “ boys will be boys.” Thus two defences to actions of tort, (a) *contributory negligence of plaintiff*, and (b) *plaintiff a trespasser*, are less effective against children of tender years than against adults. So where the defendant’s carman left his cart in a London street where children were playing, and one of them, the plaintiff, a boy under seven years of age, got upon it, and, when another boy led the horse on, fell between the shafts and was injured, the defendant was held liable in an action founded on negligence. For the plaintiff had “ merely indulged the natural instinct of a child in “ amusing himself with the empty cart and deserted “ horse,” and was “ tempted ” by the carman’s carelessness in leaving the horse and cart unattended (*Lynch v. Nurdin* (1841) 1 Q. B. 29). And in cases wherein the defence that the plaintiff was a trespasser,



which places him in the lowest grade in estimating the duties of an occupier of premises towards those upon them (see pp. 377-379), would probably have defeated the claim of an adult plaintiff, it seems that the existence of anything on the premises constituting an allurement or temptation to children to come on to the premises and play, may possibly be utilised to improve the position of the child plaintiff, by making him a licensee rather than a trespasser (*C'ooke v. Midland Great Western Railway of Ireland* [1909] A. C. 229); but this case has been much criticised, and there is a reaction against it. And although a child of tender years cannot be expected to show the same degree of care as an adult, yet, when the child is in charge of some responsible person, the negligence of that person, *e.g.*, a nurse in crossing a railway line with a child, may, by effectively contributing to the child's injury, prevent him from recovering damages in an action founded upon the negligence of a third person; which is not the same thing as saying that the child is 'identified' with the person in charge of him (see p. 385).

A parent is not liable for the tortious acts of his child; but (i) he may become liable for his own negligence, just as a school-master or a scout-master may, in supplying a child with dangerous articles, *e.g.*, rifles or air-guns and ammunition, and not exercising sufficient care to prevent them from injuring third parties; and (ii) by the Children Act, 1908, s. 99, a magistrate may, in the case of certain damage done by children, order that the fine, damages, or costs awarded shall be paid by the parent or guardian, unless it appears that the parent or guardian has not conduced to the offence by neglecting to exercise due care of the child.

It has been decided in an Irish case that a child, after its birth, cannot sustain an action for injuries

sustained by it while still unborn, *e.g.*, when its mother was injured in a railway accident by the defendant's negligence.

#### LUNATICS.

The position of a lunatic as a defendant in an action in tort is obscure. It seems probable, however, that his lunacy would afford a defence only when, by reason of it, some particular mental element, *e.g.*, malice or improper motive, was absent in a case where its presence was essential to constitute the tort.

#### MARRIED WOMEN.

A married woman is now liable for her torts; but the judgment obtained against her is limited to the amount of her separate property, not being (unless the Court shall otherwise order) such property as she is restrained from anticipating. And by the Married Women's Property Act, 1882, she cannot be sued in tort by her husband, and she cannot sue him for any tort, except as far as may be necessary for the protection and security of her separate property, *e.g.*, for Detinue, Conversion, &c. (*Larner v. Warner* [1905] 2 K. B. 539). So he cannot obtain an injunction against her to restrain her from pledging his credit; for such an action is in effect a *quia timet* action in tort to prevent by injunction the commission of a wrong, namely, a fraudulent representation that she had his authority. And a wife cannot obtain from her husband damages for having fraudulently induced her to execute a deed of separation and to accept an inadequate allowance; but she may nevertheless pursue her contractual remedies, and obtain a declaration that she was deceived into executing the deed, and an order that the deed be rescinded (*Hulton v. Hulton* [1917] 1 K. B. 813). Moreover, a husband cannot restrain his wife's liberty by confining her to his house (except,

possibly, to prevent her elopement with a paramour) ; and she can obtain her release by means of a writ of *habeas corpus* (*R. v. Jackson* [1891] 1 Q. B. 671).

### CORPORATIONS.

(i) A corporation may be sued for torts committed by its directors or other agents or servants within the scope of their employment ; even though there is some special mental element in the tort which, in the nature of things, it is difficult to impute to the corporation. For instance, a banking company has been held liable for the fraudulent representation of its manager or for an unsuccessful prosecution maliciously instituted by him ; and an insurance company has been held liable in an action, in respect of a libel published by its manager, in which a plea of qualified privilege was rebutted by proof of express malice on his part. We saw (pp. 39–40) that the doctrine of *ultra vires* operates so as to restrict the contractual capacity, and hence the contractual liability, of statutory corporations. Does it protect a corporation from the consequences of what has been called an ‘*ultra vires* tort’ committed by one of its servants ? No clear answer can be given to this question ; but it has been held in two decided cases (which have not escaped criticism) that where a railway company’s servant arrests a person in circumstances in which, even if that person had been guilty of the offence alleged against him, the company would have had no power, either under its Act of Parliament or the general law, to arrest, the company cannot be sued for battery or false imprisonment. These cases are not, however, authority for the proposition that a corporation is not liable for an *ultra vires* tort, and seem to rest rather on the ground that, in the absence of actual authority to arrest for railway offences, the implied authority can

only arise from the company's statutory powers, and therefore cannot exist in a case to which they do not extend. "It would not be held to have given "impliedly to its servant an authority which it did "not itself possess," *i.e.*, to arrest a person for travelling first-class with a third-class ticket (*Ormiston v. Great Western Railway Co.* [1917] 1 K. B. 598).

(ii) A corporation may sue for such torts as can, in the nature of things, be committed against an artificial person. You cannot commit battery or false imprisonment upon a corporation; but you can be sued in tort by a corporation for trespassing upon its land, or damaging its goods, or knowingly and without lawful excuse procuring a breach of a contract to which it is a party, or maliciously and unsuccessfully attempting to have it wound up, or defaming its reputation. It is said, as to the last case, that an action will only lie if the defamation damages the business or property of the corporation. But it is surely contrary to common experience to assert that a corporation has no personal reputation apart from that of its members; and in a recent libel action instituted by the National Society for the Prevention of Cruelty to Children, a non-trading corporation, the learned judge (Darling, J.) did not doubt for a moment that the corporation could sue for libellous statements regarding its policy and practice. If the defamation only, or in addition, affects the reputation of the members or servants of a corporation, they can sue.

### TRADE UNIONS.

A trade union, as we have seen (Vol. I., pp. 410–414), is not a corporation; but it has certain of the characteristics of a corporation and is occasionally referred to as a 'quasi-corporation.' In the famous case of *Taff Vale Railway Co. v. Amalgamated Society of*



*Railway Servants* [1901] A. C. 426, the House of Lords held that a trade union could be sued in a 'representative action' for a tort committed by its officials so as to render its funds liable; but the Trade Disputes Act, 1906, now provides that:

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

It has been held that the protection afforded by this provision to trade unions against actions in tort applies even when the tortious act was not done in the course of a trade dispute; so that if I am knocked down and injured, owing to the negligence of the driver of a motor-car in the course of his employment, I can sue his employer if it is an individual or a corporation, but not if it is a trade union. But the Act does not protect any official or servant of a trade union as such from individual liability in tort; though certain acts which are *prima facie* tortious are made by other provisions of the Act not actionable if done in "contemplation or furtherance of a trade dispute" (see pp. 403-405). Whether an injunction can be obtained against a trade union to prevent an apprehended tort, is a question which has been put, but not decided (*Ware v. Motor Association* [1912] 3 K. B. 40).

The trustees of a registered trade union in whom its property is vested may, by statute, sue in tort for the protection of that property. But it is not clear how far the trade union itself can sue in tort, nor, in particular, whether it can sue for defamation affecting the union as a whole. A recent action by a trade union for damages for slander (believed to be the first action of its kind) failed on other grounds.

## FOREIGN SOVEREIGN STATES.

As in the case of breaches of contract (pp. 42–43), an action in tort will not lie against the heads or governments of foreign states, recognised as such by the British Government, except when they voluntarily appear to submit themselves to the jurisdiction ; and their property is equally immune, *e.g.*, a ship in an Admiralty action *in rem* (see pp. 622–625). Similarly, no ambassador or other representative of a foreign state, or a *bonâ fide* member of his suite, can be sued in tort while his official status lasts ; unless, with the consent of his Government and full knowledge of his rights, he waives his immunity (Diplomatic Privileges Act, 1708).

## THE EFFECT OF DEATH :

- (i) of the tort-feasor ;
- (ii) of the person injured ;
- (iii) of a third party.

(i) *The death of the tort-feasor*, occurring at any time before a verdict against him, *primâ facie* puts an end to his liability, in accordance with the old common law rule : *actio personalis moritur cum personâ*. But this rule is now subject to several qualifications :

(a) where the deceased's estate has been enriched by the appropriation of another person's, *e.g.*, by the unlawful working and getting of another's coal, the deceased's estate is liable, on equitable grounds rather than in tort, to make restitution of the value of the property thus appropriated (*Phillips v. Homfray* (1883) 24 Ch. D. 439) ;

(b) by the Civil Procedure Act, 1833, s. 2, the deceased's personal representatives are liable, if an action against them is instituted within six months after they have taken upon themselves the adminis-

tration of his estate, for a tort committed in respect of the real or personal property of another within six months before the death of the deceased ;

(c) in the case of a breach of duty for which a remedy exists either on the contract or in tort, *e.g.*, the negligence of a solicitor, the injured person may recover from the deceased's personal representatives ;

(d) the right to the payment of compensation under the Workmen's Compensation Act, 1906, is not affected by the death of the employer.

(ii) *The death of the person injured*, in accordance with the same maxim, determined at Common Law the right of action in tort in respect of the injury ; and no action could be instituted or carried on by the deceased's personal representatives. But this rule is now subject to several qualifications :

(a) by statutes of 1330 and 1351, the deceased's personal representatives may sue in respect of injuries done to his goods and chattels during his lifetime ;

(b) by the Civil Procedure Act, 1833, s. 2, they may sue in respect of injury done to his real property within six months before his death, provided their action is instituted within a year after his death.

So far, then, the position is, briefly, that rights of action in tort in respect of the deceased's real and personal property (subject, in the case of real property, to certain limits of time) survived to his personal representatives ; whereas rights of action in tort in respect of his person or reputation are determined by his death.

But (c) the Fatal Accidents Acts, 1846, 1864, and 1908, give a new cause of action to the deceased's personal representatives on behalf of certain members of his family for damages (which the jury may apportion amongst them) in respect of any wrongful act, neglect, or default of another, which caused his death, and which would have entitled him (had he lived) to sue ;

even though it amounts to a felony. The action must be brought within twelve calendar months of the death of the deceased (except when some statute, *e.g.*, the Public Authorities Protection Act, 1893, imposes a shorter period of limitation), and damages can be recovered only in respect of pecuniary loss, actual or prospective, resulting from the death—"some substantial detriment in a worldly point of view." So a father whose daughter (aged sixteen years) was killed by the defendant's neglect within two months of the expiry of her apprenticeship to a dressmaker, was able to recover damages for the prospective loss of the money she would have earned when her apprenticeship expired; although, up to date, she had received no wages and made no contribution to the family income. But where the deceased was a child of four years, the father failed to recover any damages; for upon a consideration of all the circumstances he could show "a mere speculation of prospective benefit." And a father was held unable to recover the expenses of his child's funeral. But the pecuniary loss resulting from the death of the deceased may consist either of money paid, or of services rendered by the deceased, *e.g.*, where the deceased was the plaintiff's wife and did the work of the house and looked after their child. It is important to note that, although these Acts confer a new right of action upon certain members of the family of the deceased, it is nevertheless liable to be defeated by any defence which could have been raised against the deceased "if death had not ensued," *e.g.*, contributory negligence, statutes of limitation, *volenti non fit injuria*, or a contract not to sue.

(d) In certain circumstances, the personal representatives of a workman under the Employers' Liability Act, 1880, and his dependants under the Workmen's Compensation Act, 1906, have a claim against his



employer in respect of his death by injury or industrial disease (see pp. 301-307).

(iii) *The death of a third party*.—Lord Ellenborough thus enunciated what is sometimes called “the rule “in *Baker v. Bolton* ” (1808) 1 Campb. 493: “In “a civil court, the death of a human being cannot be “complained of as an injury.” In the first place, as we have already seen, this rule is very much qualified by the Fatal Accidents Acts, the Employers’ Liability Act, and the Workmen’s Compensation Act. Second, it has no place in an action for damages for breach of contract. And so a man who bought from a grocer some poisonous tinned salmon which was eaten by, and resulted in the death of, his wife, was allowed to recover, in an action for damages for breach of warranty of fitness for human consumption (*i.e.*, an action on contract), damages for the pecuniary loss sustained by him in consequence of her death and the resulting necessity of engaging a housekeeper; for her death was “not an essential part of the cause of action, “but . . . only an element in ascertaining the damages” (*Jackson v. Watson & Sons* [1909] 2 K. B. 193). Thirdly (and in this respect “the rule in *Baker v. Bolton* ” is still operative), although a master may obtain from a person who injures his servant damages for loss of services, he cannot sue a person who tortiously causes his servant’s death and thereby permanently deprives him of the services, at any rate if the death is instantaneous (*Osborn v. Gillett* (1873) L. R. 8 Ex. 88); though, as Scrutton, L.J., has pointed out, if the plaintiff in *Osborn v. Gillett* had sued, not as a master in respect of loss of services, but as a father under the Fatal Accidents Acts in respect of pecuniary loss, it is difficult to see why he should not have succeeded. Similarly, although a husband or a wife can recover, under the Fatal Accidents Acts, the pecuniary loss resulting from the

death of the spouse, “the rule in *Baker v. Bolton*” prevents the recovery of damages from the wrongdoer for the loss of the society and comfort of the deceased spouse. And recently the Admiralty Commissioners, in suing the owners of a steamship for damage sustained through the loss of a submarine and her crew through collision and sinking, were precluded by “the rule in “*Baker v. Bolton*,” together with other grounds, from recovering the capitalised amount of the pensions payable to the relatives of the deceased men.

The effect of *bankruptcy* upon the right to bring an action, or the liability to an action, in tort, is discussed later (see pp. 644–645).

#### MASTER AND SERVANT.

We have already (Chap. XII) outlined the general character of the contract of service ; and the master’s liability *to third parties* for the torts of his servants will be considered in the ensuing chapter on Vicarious Liability. But the master’s liability *to his servant*, for injuries sustained by the servant in the course of his employment, has given rise to so many difficult legal and economic questions, as to call for special treatment here. The tendency of recent legislation is to make the master’s liability to his servant for the latter’s injuries more and more an absolute one, irrespective of any wrong-doing on the part of the master ; but we must not forget that, at Common Law, the master’s liability was, and, so far as it is not modified by recent statutes, or so far as the injured servant may prefer to resort to his common law rights instead of availing himself of those which the legislature has conferred upon him, is dependent, on the master’s fault.

(A) *At Common Law*.—A master is, *primâ facie*, liable to his servant for injuries which the latter sustains in the course of the employment as the result of the master’s negligence. That negligence may con-

sist, for instance, in failure in his duty to supply proper plant and appliances, or in his selection of careful persons to superintend the servant's work or to work with him. But this liability is very seriously qualified by the operation of two defences which are available to the master: (i) *volenti non fit injuria*, i.e., that the servant not merely knew of some danger arising from the master's negligence, but voluntarily consented to expose himself to the risk of it—a defence which, as we have seen (pp. 281–282), is of general application, and is not confined to the case of a servant suing his master. The limits of this defence were defined by the House of Lords in *Smith v. Baker* [1891] A. C. 325, from which case it is clear, that mere continuance in service, with knowledge of the risk, does not preclude the servant, if he suffers injury from his master's negligence, from recovering damages for his master's breach of duty.

(ii) The second defence rests on the doctrine of *common employment*, and is in fact a species of, and is derived from, the former. According to this remarkable doctrine, of which the starting-point is usually said to be the case of *Priestley v. Fowler* (1837) 3 M. & W. 1, a servant is deemed, by entering into or remaining in the service of a master, voluntarily (so far as the master is concerned) to expose himself to the risk of the tortious conduct of any of his fellow-servants towards him; and, accordingly, he is prevented from recovering from his master (though not from them) damages for injury sustained by him as the result of their torts, although, if he were a stranger, he would have a remedy against their master. For instance, if, through the negligence of the driver of a motor-omnibus, the conductor and a passenger are injured, this defence defeats the Common Law action of the conductor, but not that of the passenger, against the proprietor. In order that the defence should be available, there must be both a common master and common work; but this does not mean that the

person causing and the person suffering the injury must be doing the same or similar acts. If two vessels belonging to the same shipowner come into collision, a seaman on board the one who is injured by the negligence of the captain of the other can recover damages from their common master; because the person causing and the person suffering the injury are not engaged on common work. But an actress and a scene-shifter in the same performance, or a railway engine-driver and a guard on the same train, are doing common work, though doing very different kinds of work. Similarly, there must be a common master; so, where two firms, A. & Co. and B. & Co., were engaged as independent contractors upon the same building operations, and an employee of A. & Co. was injured by the negligence of an employee of B. & Co. with whom he was engaged in common work, B. & Co. were not allowed to plead the defence of common employment against the injured man, because there was no common master (*Johnson v. Lindsay* [1891] A. C. 371).

The defence is also available against an infant servant, and against a mere volunteer who has no interest in the work in which he 'lends a hand,' beyond that of the casual spectator; for it would be unreasonable that he should be placed in a better position against the master than one of his own servants, as, in many cases, such a person is not only a volunteer but a trespasser. But when the plaintiff is not a mere volunteer or trespasser, but, though gratuitously, is helping the defendant's servants, with their assent, to do something to or for his own property, *e.g.*, to shunt a truck containing the plaintiff's cattle, and he is injured through the negligence of one of the defendant's servants, the defence of common employment cannot be pleaded against him. And an actress who, in accordance with a common practice, was



allowed or invited by the lessee of a theatre to take part in the rehearsals of a play without remuneration, but with the prospect of an engagement, and was injured through the negligence of the lessee's servant, was not prevented by this defence from recovering damages from the lessee for her injuries.

Finally, neither the defence of *volenti non fit injuria*, nor that of common employment, is available to an employer who is sued by a servant who has sustained injury as the result of the breach by the employer of an absolute duty imposed upon him by statute, *e.g.*, to fence in dangerous machinery.

Two other defences should be mentioned : (iii) the contributory negligence of the servant (see pp. 384–385) and (iv) his death, subject, since 1846, to the Fatal Accidents Act (see pp. 297–298).

(B) *The Employers' Liability Act*, 1880, marks the next stage. Its main object was to abolish the defence of common employment in the limited number of cases to which the Act refers. Accordingly, it provides that a 'workman' or his legal personal representatives, or other persons entitled in case of his death, shall have, in a number of cases, the same right to compensation for injuries incurred in the service of the employer as they would have against a stranger ; except that there is a limit to the amount recoverable. These cases include injuries caused :— (1) by defects in the employer's premises and machinery, where such defects are due to, or have not been discovered or remedied through, the negligence of the employer or any servant entrusted by him with the duty of seeing to their proper condition ; (2) by the negligence of a fellow-servant having authority over the injured workman, or being in charge of any signal points, locomotive, or train on a railway. This Act applies only to workmen falling within

the definition of 'workman' in the Employers and Workmen Act, 1875, and to railway servants, that is, broadly speaking, to all persons engaged in manual labour, agricultural or industrial, but not to menial or domestic servants. Thus it has been held, that it does not apply to an omnibus conductor or a shop assistant; but the driver of a motor omnibus, whose duty it was to do slight repairs to the vehicle was held to be included. And railway servants are comprised within the Act as a class, whether they perform manual labour or not.

Notice of the injury must be given to the employer within six weeks of the accident; and the action (which is assigned to the county courts) must be instituted within six months of the accident causing the injury, or, in the case of death, within twelve months of the death. The maximum amount of compensation recoverable, either in case of death or non-fatal injury, is the amount of the estimated earnings of a workman in the same grade during the period of three years preceding the accident. Amongst the defences available to an employer who is sued under this Act are the following: (i) by s. 2, sub-s. 3, of the Act, the workman's knowledge of the defect or negligence causing the injury, and his failure to inform some superior servant or his employer, unless the workman was aware that his employer or a superior servant already knew of it; (ii) the servant's contributory negligence (see pp. 384–385); (iii) *volenti non fit injuria*, severely limited as in a common law action by the House of Lords in *Smith v. Baker, supra* (and indeed that case arose in proceedings under the Act); (iv) that the servant had expressly contracted himself out of the Act—but not, of course, the defence of common employment, the abolition of which within the sphere of the cases dealt with by the Act was its main object. It must also be borne in mind, that

the employer's death before judgment terminates the proceedings ; and the claim does not in that event survive against his estate.

(c) *The Workmen's Compensation Act, 1906.*—This legislation, begun partially and tentatively in 1897, is based upon economic considerations rather than upon legal principles, and, as its title indicates, looks rather to the compensation of the workman than to the liability of the employer. The liability is not based on any negligence or other fault of the employer ; and the workman (except in one case to be mentioned) is not disentitled to any compensation by any negligence or other fault on his part. The vast majority of employers insure themselves against their liability under these Acts (and indeed against liability to their servants however arising), with the result, that the net effect of the Acts is almost equivalent to a scheme of compulsory insurance. The mass of litigation arising under the Acts turns mainly upon textual interpretation, and will therefore not have much concern for us in this work.

The Workmen's Compensation Act, 1906, applies to every 'workman' as defined by the Act, that is, to any person, male or female, who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, oral or in writing ; with the following exceptions : (1) a person employed otherwise than by way of manual labour, whose remuneration exceeds £250 a year ; (2) a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business ; (3) a member of a police force ; (4) an outworker, *i.e.*, a person to whom articles or materials are given out to be made up, cleaned, or similarly dealt with,

in his own home or on other premises not under the control of the person who gave out the materials or articles ; and (5) a member of the employer's family dwelling in his house. Domestic servants are within the scope of the Act.

The Act is expressly made applicable to seamen, subject to special provisions, and to persons in the employment of the Crown, unless in the naval or military service ; but, except in the case of seamen and apprentices, it has no application outside the United Kingdom, *e.g.*, to a workman travelling abroad on his employer's business.

The main provisions of the Act are as follows :—|

(i) *Accident*.—Compensation is payable by the employer in all cases of injury by accident, arising out of and in the course of the employment, as the result of which the employee dies, or is disabled, for a period of at least one week, from earning full wages ; but if it is proved that the injury is attributable to the serious and wilful misconduct of the workman himself, no compensation is payable unless the injury results in death or serious and permanent disablement.

'Accident' is difficult to define ; but it usually conveys, for the purpose of this Act, the meaning of "something which is capable of being described as "having occurred on a particular date," *e.g.*, an explosion in a coal mine, a blow from a revolving wheel, murder, assault by poachers on a game-keeper, cerebral hemorrhage due to over-exertion ; but not to heart disease resulting from continued exertion, or pneumonia caught by a locomotive-engine driver owing to prolonged exposure on a cold day without adequate clothing or food.

Moreover, the accident must in some way be connected with the employment. And it is not enough that it should have happened during working hours ; it must usually be of such a kind that the employment



peculiarly exposes the workman to it. For instance, when a bank official is murdered while carrying cash and other valuables, the employer is liable; but he is not when a charwoman, who is sent out to post a letter for her employer, slips in the street on a banana skin and breaks her leg.

(ii) *Tribunal*.—Questions arising under the Act are determined by arbitration in accordance with the provisions contained in Schedule II. of the Act. If the parties are unable to agree upon an arbitrator, the matter is decided by the county court judge, sitting as arbitrator (which is the usual course), or an arbitrator appointed by him. The Arbitration Act, 1889, does not apply to such arbitrations.

(iii) *Scale of compensation*.—The scale of compensation is as follows :—

(a) *Death leaving persons wholly dependent*. In case of death of the workman leaving any members of his family wholly dependent on him, a sum equal to three years' earnings, not being less than £150 or more than £300. Dependency is a question of fact in each case, and includes, not only an actual, but a reasonably anticipated prospect of, support by the deceased workman. The term 'member of a family' means wife or husband, parent, grand-parent, and step-parent, child, grand-child, or step-child, or brothers and sisters of the whole or the half-blood. Compensation is payable to parents and grand-parents and children and grand-children, even where they are only related illegitimately to the deceased workman;

(b) *Partial dependence*. In case of death of the workman leaving such persons partly dependent on him, a reasonable sum not exceeding the amount which would have been payable in the previous case;

(c) *No dependants*. The reasonable expenses of medical attendance and funeral, not exceeding £10;

(d) *Total or partial incapacity*. Where the workman

is totally or partially incapacitated, a weekly payment (which may be reviewed in the event of any change of circumstances, and diminished, increased, or ended, and also may after six months be redeemed for a lump sum) not exceeding 50 per cent. of the workman's average earnings for the previous twelve months, or such less period during which he has been in the same employment, and in no case exceeding £1, or, in the case of a workman under twenty-one years of age, not exceeding 100 per cent. of his average earnings, and in no case more than 10s.

(iv) *Notice of the accident* must be given to the employer as soon as practicable; and the claim for compensation must be made within six months of the accident or of the death.

(v) *No contracting-out* of the Act is allowed, except under a scheme of compensation sanctioned by the Registrar of Friendly Societies as being not less favourable to the workmen, and approved by a majority of the workmen concerned on a ballot being taken.

(vi) *Persons liable to pay compensation*.—The employer or his personal representatives are primarily liable to pay compensation. For this purpose, a person who enters into a contract “in the course of” or for the purposes of his trade or business” with another person (called the ‘contractor’) for the execution of any work by the contractor, is liable to pay compensation as an employer to the contractor's workmen, who may proceed against either their immediate employer (the contractor) or the ultimate principal, who may, in the latter event, obtain an indemnity from the contractor. And where a workman is injured by a stranger, in such circumstances that he recovers compensation from his employer, the employer, by a process of subrogation, can recover from the stranger the amount of the compensation, to

the extent that the workman himself could have recovered damages from the stranger, had he elected to sue him. The workman cannot *recover* both damages from the stranger and compensation from his employer; though he may commence proceedings against both.

(vii) *Bankruptcy or winding-up of employer*.—In case of the bankruptcy of the employer, or, if the employer is a company, the winding-up of the company, the rights of the employer under any contract of insurance which he may have entered into against liability under the Act, vest in the workman; who, if the liability of the insurers to the workman is less than the employer's liability, may prove for the balance in the bankruptcy or winding-up. The workman's claim to compensation is, to the extent of £100 in any individual case, payable (together with certain other debts) in priority to all other debts in the employer's bankruptcy, or winding-up (p. 654).

(viii) *Industrial diseases*.—In addition to compensation for injury due to accident, compensation upon the same terms, subject to slight modification, may also be claimed for disablement or death caused by certain 'industrial diseases' (such as anthrax, lead-poisoning, and ankylostomiasis or 'miner's worm') due to the nature of the employment. But this part of the Act has been held not to apply to seamen.

*Temporary legislation*.—It should also be mentioned that the Workmen's Compensation (War Addition) Acts, 1917 and 1919, provided that, during the continuance of the recent war and for a period of six months thereafter, a weekly payment of compensation receivable by a workman in respect of total incapacity should be increased during the relevant period by an addition of, at first, one quarter and, later, three quarters of the amount of the weekly payment.

(D) *Choice of remedies*.—It should be clearly understood, that neither the Employers' Liability Act, 1880, nor the Workmen's Compensation Act, 1906, takes away from the servant any of his pre-existing remedies ; and, as they both contain maximum limits of the compensation recoverable, it will sometimes suit the workman or his personal representatives better to pursue the common law remedy, supplemented (if necessary) by the Fatal Accidents Acts. But the various remedies, common law and statutory, available to the workman are not cumulative ; and he must make his election. (i) If he sues at Common Law or under the Act of 1880, and fails, he cannot subsequently bring proceedings for compensation under the Act of 1906 ; but he may at once apply to the Court before which he has failed, for the assessment of the compensation due to him under the Act of 1906. (ii) If he recovers compensation under the Act of 1906, he cannot subsequently bring an action either at Common Law or under the Act of 1880. It should be noted that, in proceedings under the Act of 1906, the defences of *volenti non fit injuria*, common employment, and contributory negligence by the workman (except in the case of his serious and wilful misconduct discussed on p. 304, and then only within narrow limits), are not available to the employer.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of this subject the student should refer to Sir Frederick Pollock's " Law of Torts " or Sir John W. Salmond's " Law of Torts." Many of the cases referred to in the preceding pages and below will be found in Professor Kenny's " Cases on the Law of Tort " ; and the law is stated succinctly in " Digest of English Civil Law," pp. 326-349, 455-463.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Jennings v. Rundall* (1799) 8 T. R. 335.

*Burnard v. Haggis* (1863) 14 C. B. N. S. 45.



*Lynch v. Nurdin* (1841) 1 Q. B. 29.

*Cooke v. Midland Great Western Railway of Ireland* [1909] A. C. 229.

*Latham v. R. Johnson & Nephew Limited* [1913] 1 K. B. 398.

*Mersey Docks Trustees v. Gibbs* (1866) L. R. 1 H. L. 93.

*Cornford v. Carlton Bank* [1900] 1 Q. B. 22.

*Ormiston v. Great Western Railway Co.* [1917] 1 K. B. 598.

*Vacher v. London Society of Compositors* [1913] A. C. 107.

*Phillips v. Homfray* (1883) 24 Ch. D. 439.

*Barnett v. Cohen* [1921] 2 K. B. 461.

*Smith v. Baker* [1891] A. C. 325.

*Priestley v. Fowler* (1837) 3 M. & W. 1.

*Hayward v. Drury Lane Theatre Limited* [1917] 2 K. B. 899.

*Johnson v. Lindsay* [1891] A. C. 371.]

## CHAPTER XIX.

## LIABILITY FOR THE TORTS OF OTHERS.

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ORDINARILY speaking, a person is responsible only for his own wrong-doing ; and it requires some special relationship or other circumstances to justify his legal responsibility for the wrong-doing of others. When he is so liable, his liability is sometimes called vicarious ; that is, he does wrong by deputy (*vicarius*). We shall examine the circumstances giving rise to vicarious liability under the following heads :

- (i) principal and agent ;
- (ii) employer and ' independent contractor ' ;
- (iii) master and servant ;
- (iv) husband and wife.

In the first three cases, the vicarious liability, when it exists, rests upon principle of substantive law ; the fourth case rests rather upon rules of procedure.

(i) *Principal and agent*.—In considering the nature of the contract of agency in an earlier chapter (p. 91) we saw that an agent is employed by a principal for the purpose of placing his principal in contractual relations with other persons. The principal is liable to third persons for (a) torts which his agent commits in connection with the process of making contracts on behalf of his principal, whether the principal actually authorises them or not, (b) torts which the

principal expressly authorises, and (c) torts which a principal ratifies. Let us consider each of these cases separately.

(a) The principal's liability for the torts of his agent, in the absence of express authority or ratification, is not so wide as that of the master for his servant's torts, which, if committed in the course of or within the scope of the service, render the master liable. That an important difference exists is clear; and it is easier to illustrate than to define it. If I send my servant, a carman, to deliver a load of coal at a customer's house, and on the way he negligently knocks you down with his cart, I am liable to you for his tort. If I call upon a house agent and ask him to interview the owner of a certain house and try to buy it for me for £2,000, and the house agent, in driving his car to see the owner of the house, negligently knocks you down with his car, I am not liable to you for his tort. If a legal ground for this distinction is sought, it will probably be found in the fact that I can or should control to some extent the manner in which my carman drives, or that I ought only to employ careful carmen; but, by many, the economic or practical justification for the onerous responsibility placed upon a master will be found more satisfactory, that is, that carmen are not usually worth 'powder and shot.' As Willes, J., once said, "it is well known that there is virtually no remedy against the driver of an omnibus; therefore it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible. For there ought to be a remedy against some person capable of paying damages to those injured by improper driving."

(b) The liability of a principal who has expressly authorised a tort requires no special consideration. Of course he is liable to the party injured.

(c) The liability of a person who ratifies the tortious conduct of another, and so adopts him as his agent, is based upon the same principle as in the case of the ratification of a contract made without authority by a person professing to act as agent (p. 95). That principle has been stated as follows by Tindal, C.J. "That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority" (*Wilson v. Tumman* (1843) 6 Man. and G. at p. 242). Thus, when a firm of Liverpool merchants, on being informed by their agent in Africa that he had bought a ship for them and taken possession of it (which he had no previous authority to do), ratified that purchase, they were held liable for damages for the tort of Conversion to the true owner of the ship, without whose consent it had been unlawfully sold to the agent (*Hilberry v. Hatton* (1864) 2 H. & C. 822).

There is one tort which, by reason of its frequent connection with contracts, is especially likely to be committed against third parties by an agent, or by a principal through the instrumentality of his agent, namely fraud or deceit. (a) *Innocent principal and fraudulent agent*. That the principal is liable for the fraudulent representations of his agent in connection with the making of a contract on behalf of his principal, whether the agent commits the fraud for his own purposes or in the supposed interests of his principal, is clear. (b) *Fraudulent principal and innocent agent*.



Where the agent makes an untrue statement which he believes to be true, but which his principal knows to be untrue, the principal is liable for the tort of deceit if he expressly or impliedly authorised the making of the untrue statement. (c) *Negligent principal and innocent agent.* Where the agent makes an untrue statement which he believes to be true, but which, if he shared his principal's knowledge of the circumstances, he would know to be untrue, it is not clear whether or not the agent's statement and the principal's knowledge must be coupled together so as to form a fraud for which the principal is liable. But the better opinion is, that the principal is liable in damages if he deliberately kept his agent ignorant, intending him to make a false statement, or was inadvertent in not communicating the crucial information to his agent.

*Partners.*—The liability of partners and of the firm for torts committed by one of them rests on principles of agency and upon ss. 10 to 12 of the Partnership Act, 1890, and has already been referred to (pp. 239-240).

(ii) *Employer and independent contractor.*—It is of vital importance to grasp the distinction between a servant and 'an independent contractor.' As we have seen (pp. 213-214), a servant is one who contracts to work for a master and subject to his order and control, *e.g.*, a housemaid, a chauffeur, a managing clerk, a motor-omnibus driver; while an 'independent contractor' has been defined (by Sir Frederick Pollock in his *Law of Torts*) as "one who undertakes to produce a given result but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand," *e.g.*, a person employed to build a bridge for a railway company, to repair a highway

for a county council, to carry out the removal of a houseful of furniture, to drive cattle home from market to the purchaser's farm. (Such a person is often called in popular language, and not in any legal sense, a 'contractor.')

So the main ground of the distinction is the degree of control exercised by the person for whom the work is being done.

The general rule is, that an employer is not liable for the torts of an independent contractor or of that person's servants, even when committed within the scope of the employment; whereas, as we shall soon see, the general rule in the case of master and servant is the reverse. But the employer is liable for the negligence of the independent contractor and of that person's servants in the following cases:

(a) *Where the work contracted to be done is itself unlawful, e.g., amounts to a nuisance.* Thus, where the Sheffield Gas Consumers Company employed a contractor to open trenches along the streets of Sheffield, to enable the company to lay gas pipes, and the contractor's servants negligently left a heap of stones and earth on the footway, over which the plaintiff fell and was injured, and neither the company nor the contractor had obtained the necessary authority to open up the streets, the company was held liable in damages to the plaintiff (*Ellis v. Sheffield Gas Consumers Co.* (1853) 2 E. & B. 767).

(b) *Where the work contracted to be done is lawful, but is intrinsically dangerous, or likely to be dangerous unless proper precautions are taken,* particularly when it is to be done on or near a highway. For instance, when the National Telephone Company employed a plumber to solder pipes on a highway, which involved the use of dangerous benzoline lamps, and a passer-by was injured by the bursting of a lamp, owing to the negligence of the plumber's servant, the passer-by recovered damages from the company (*Holliday v.*

*National Telephone Co.* [1899] 2 Q. B. 392). And when the defendant, having bought a cow and calf at Exeter market, employed a drover to drive them to his farm along the highway, a thing of itself dangerous, and, owing to the drover's negligence, the plaintiff, a passer-by, was tossed by the cow and injured, he recovered damages, on the ground of the negligence both of the drover (the independent contractor) and of the defendant himself in employing only one man to drive a cow and calf through the streets of a city.

(c) *When the employer is under an absolute duty, arising under a statute or the Common Law, to do the work delegated to the independent contractor.* For instance, if by statute a duty is imposed upon a railway company to build a bridge, and the company employs a contractor to do it, who does it negligently, the company cannot free itself from the duty by employing a contractor to fulfil it, but remains liable for the consequences of his negligence.

(d) *When the employer retains or assumes the superintendence and control of the work contracted to be done, thereby depriving the relationship of employer and independent contractor, to a greater or less extent, of what we have seen to be its chief characteristic, namely, absence of the employer's control.* This exception is also illustrated by *Holliday v. National Telephone Co.*, *supra*, where the company's foreman was supervising the plumber's servant at work on the job in the course of which the explosion took place.

The following further points should be noted upon cases coming within these exceptions to the rule of the employer's immunity. (1) The employer, if made to pay damages to a third party for the negligence of his independent contractor or that person's servants, will, in many cases, have a right of indemnity against the independent contractor and his servants. (2) In most cases, the independent contractor and his servants

will themselves also be liable to the injured third party. (3) In cases coming within any of the four exceptions given above, the employer is liable for the negligence of the independent contractor or of his servants. But, in the first case, it is clear from the judgments in *Ellis v. Sheffield Gas Consumers Co.*, *supra*, that, when the act contracted to be done is unlawful *per se*, the employer is not merely liable for the independent contractor's negligence in doing it, but would be liable for the unlawful act itself, *i.e.*, in that case a nuisance, to any person injured by it. (4) It is sometimes said, in connection with exception (d) above, that an employer is liable if he takes part in and interferes with the work. Thus, one who hired a coach with four horses and two postillions to drive to the Derby, and, in his enthusiasm, mounted the box-seat and directed operations, in the course of which the plaintiff's gig was overturned and damaged through being jostled by the coach, was held liable (*McLaughlin v. Pryor* (1842) 2 M. & G. 48). But he was held liable, not vicariously, but directly as *dominus pro tempore*, and a co-tortfeasor with the postillions; which seems to be the true ground of liability in such cases.

(iii) *Master and servant.*—*The master is liable for the torts of his servant committed within the scope of his employment, and for any other torts by his servant which he actually authorises or ratifies.*

The liability arising from actual authority or ratification need not detain us. The *crux* of the matter is the meaning of the term 'scope of the employment'; and any one who expects to be able to reconcile the very numerous cases upon the question what is, and what is not, within the scope of or in the course of a servant's employment, has disappointment in store for him. Nowhere (except perhaps in Negligence cases) is it



more important to bear in mind that the report of a case is, at best, an attempt to reproduce in cold print what was spoken by witnesses and counsel, and listened to by a judge and a jury, sometimes in circumstances involving a considerable amount of human interest, and that it is next to impossible to convey on paper the impressions which, after being made upon the minds of judge and jury, are reflected in the judge's directions to the jury and in their verdict and his judgment. So two cases which appear to us almost indistinguishable may not have worn that appearance to those concerned in the later of them. The question of the scope of a servant's employment is partly a question of law for the judge, and partly a question of fact for the jury.

*Whose is the servant?*—We have distinguished the servant from an independent contractor. Another question frequently causing great difficulty, when it is clear that the tort-feasor is a servant, is: Whose is the servant? or, in other words, Who is the master of this tort-feasor? "The person who has a right, "at the moment, to control the doing of the act," is a judicial answer to this question which we shall find helpful. That person is, of course, usually the man who engaged the servant, pays his wages, and has power to dismiss him—the man whom the tort-feasor would regard as his master. But it by no means follows that such a person will be treated by the law as the master *pro hac vice*, and responsible for the servant's tort. Let us take some illustrations. Two old ladies, who own a carriage, are in the habit of hiring, from a livery-stable keeper, a coachman with a pair of horses to drive their carriage when required; and, when doing so, the coachman wears their livery. One day, owing to the coachman's negligence in leaving the horses and carriage unattended, the plaintiff is injured. It was held, that the old ladies were not

liable; the coachman was the servant of the livery-stable keeper and not their servant (*Quarman v. Burnett* (1840) 6 M. & W. 499). Similarly, a town council which hired horses and drivers to drive its watering carts, was held not liable for a driver's negligence. But if the servant is in effect *lent* to another person, often with some article hired out, then the hirer usually becomes master *pro hac vice*, and is liable for that servant's torts. For instance, when a shipowner lent to a stevedore certain of his crew to help in the unloading of the vessel under the stevedore's direction and control, or the owner of a crane lent it to another with a servant to work it under the direction and control of the hirer (*Donovan v. Laing* [1893] 1 Q. B. 625). The owners of horse-cabs and taxi-cabs have been placed in a peculiar position, at any rate within the Metropolitan District, by the language of the London Hackney Carriages Act, 1843. As regards third parties, both the 'fare' and others, the relation between the owner and the driver is that of master and servant; as between themselves, that of bailor and bailee. The 'fare' is, of course, not liable for the driver's tort, unless he interferes in the driving and makes himself *dominus pro tempore*.

*The scope of the employment.*—(a) *If, when the tort is committed, albeit during working hours and even with the use of the master's property, the servant is "on a frolic of his own," the master is not liable.* To take an illustration which will be familiar to those who know London. In *Storey v. Ashton* (1869) L. R. 4 Q. B. 476, a carman was ordered by his master, the defendant, to bring some empty bottles from Blackheath to his premises in the Minories, his authorised route being from Blackheath to and across London Bridge (there being then no Tower Bridge), and thence along Eastcheap to the Minories. Arrived at the north end of London Bridge, the carman, in order

to oblige his companion (a clerk of the defendant), kept on northwards past the Bank of England, and, while driving along the City Road towards Barnsbury, whence he was going to fetch a cask from the house of the clerk's brother-in-law to some place in the City, he negligently knocked down the plaintiff with the van and injured him. The master was held not liable; for the carman, after crossing London Bridge, started upon "a new and independent journey" "which had nothing at all to do with his employment." But it seems that it is a question of degree; and if the driver for his own purposes "took a somewhat "longer road," or went by a round-about way, it does not follow that the master is divested of liability. Yet, where the defendant's carters were instructed to cart rubbish from and to certain well-defined premises, but, to suit their own purposes by shortening their journeys and earning more wages, were in the habit of tipping loads of rubbish on to the plaintiff's land, contrary to the defendant's instructions and without his acquiescence, he was held to be not liable; on the ground that the carters were acting outside the course of their employment (*Joseph Rand, Limited v. Craig* [1919] 1 Ch. 1).

(b) *The fact that a servant is acting for his own purposes, even criminal purposes, and not in his master's real or supposed interests, does not take outside the scope of the employment a tort which is otherwise within it.* For instance, in *Lloyd v. Grace Smith & Co.* [1912] A. C. 716, the defendant was a solicitor whose managing clerk defrauded a client of the defendant, by fraudulently inducing her to hand to him certain title deeds and execute two deeds the effect of which, unknown to her, was to enable the managing clerk to dispose of her property. He then did so, and pocketed the proceeds. He was authorised to transact business of this kind on behalf of his master;

and the House of Lords held the master liable, on the grounds both of the breach of a contract, made by the managing clerk as his master's agent, to carry out the client's business honestly and diligently, and of his tort, namely, fraud, committed within the scope of his authority. In this case, the House of Lords effectually dispelled the belief which existed (as the result of a much-misunderstood *dictum* by Willes, J., in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 259) that it was necessary, in order to make the master liable, to prove that the servant also committed the tort "for the master's "benefit"; but the effect of *Lloyd v. Grace Smith & Co.* upon certain other cases is not so clear. The important fact is, that the managing clerk's wrongful act was committed within the scope of his authority. He was held out by his master as authorised to transact business of that nature with clients.

But where the plaintiff's jewellery was stolen from a brougham hired by him of the defendant by thieves with whom the driver, the defendant's servant, was a confederate, the defendant was held not liable, on the ground that, when the servant drove off to meet his fellow-thieves, he broke the employment and ceased to act in the course of his employment, becoming, as it were, a stranger to his master (*Cheshire v. Bailey* [1905] 1 K. B. 237). And this decision, which was given before *Lloyd v. Grace Smith & Co.*, has been followed since in almost identical circumstances.

(c) *The fact that the servant's tort is something which, or occurred while doing something which, was expressly prohibited by the master, does not take the tort outside the scope of the employment, if it is otherwise within it.* Thus, in *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526, the defendant company, one of whose omnibus-drivers, by his reckless and improper driving while racing his omnibus against another in



defiance of his master's express prohibition, injured the plaintiff, was held liable. But the remarks in that case upon 'the master's benefit' must be read subject to the case of *Lloyd v. Grace Smith & Co.*, *supra*. In *Joseph Rand, Limited v. Craig*, *supra*, however, the prohibited act was outside the scope of the employment.

*Unauthorised delegation of duties.*—A servant has no power (apart from express authority or grave emergency) to delegate his duties to a stranger or to a fellow-servant of a different kind, so as to make the servant's master liable for the torts of the person to whom the work is delegated. But it frequently happens, that the master becomes liable for the improper act of his servant in allowing a third person to perform his duties. For example, a master was held liable for the negligence of his van-driver in leaving the van-boy in charge, and giving him the opportunity of trying his hand at driving the van, instead of contenting himself with his proper duty of swinging on the rope behind ; though the master could not have been made liable directly for the boy's negligence, because driving was not his employment. Similarly, an omnibus company has been held liable for the negligence of a driver in allowing the conductor to drive the omnibus, in his presence and seated beside him ; although it could not have been held liable directly for the conductor's negligence, because he was employed as conductor, not as a driver, and the qualities which make for success in these two careers respectively are not necessarily identical (*Ricketts v. Thomas Tilling, Limited* [1915] 1 K. B. 644). And an omnibus company is not liable for the negligence of a conductor who turns the omnibus round at the end of a journey, while the driver is properly having his dinner ; because the conductor's negligence is outside the scope of his employment, and the driver

is not negligent at all. Similarly, when a policeman assured the driver of an omnibus that he was too drunk to drive, and the driver and the conductor together then purported to authorise a by-stander to drive the omnibus home, the proprietor of the omnibus was held not liable (*Gwilliam v. Twist* [1895] 2 Q. B. 84).

*Erroneous exercise of servant's discretion.*—Actions are frequently brought against railway, tramway, and omnibus proprietors, by passengers who are assaulted or arrested or ejected by the servants of these defendants in the erroneous exercise of their discretionary authority to protect their employers' interests, *e.g.*, by ensuring that passengers do not travel without having paid the proper fare. A private Act of Parliament regulating the defendant's undertaking is often relevant in these cases; but the general principle is, that the employer is liable for such erroneous exercises of his servant's discretionary powers, *e.g.*, the wrongful arrest by a railway servant of a passenger who had left his return ticket at home, the wrongful ejection from a tramcar of a passenger whom the conductor erroneously believes to have travelled beyond the point to which his ticket entitled him to travel (*Goff v. Great Northern Railway* (1861) 3 E. & E. 672). When the defendant is a statutory corporation it has been suggested, as we have seen (pp. 291–292), that this principle does not always apply when the servant, under a mistake as to the facts, does an act which, even if the facts had been as he thought they were, the corporation would have no power to do.

*Kinds of torts.*—There does not appear to be any limit as to the kind of tort which, when committed by a servant within the scope of his employment, renders his master liable. Cases of vicarious liability for torts involving a definite mental element, such

as Fraud or Malicious Prosecution, are numerous ; as also are cases of torts which are also crimes. And, when the tort amounts to a felony, the failure to prosecute the felony does not prevent the victim from suing the master for the tort.

*Husband and wife.*—(a) *Wife's ante-nuptial torts.*—A husband is liable for his wife's torts when committed *before* marriage, to the extent of the value of his wife's property which he may have acquired "from or through" her, after deducting sums already paid by him in respect of his liability for her ante-nuptial torts and contracts (Married Women's Property Act, 1882, s. 14). As between himself and her, he has a right to be indemnified out of her separate property ; and he may be sued either alone or with her. The effect of the termination of the marriage, by death or otherwise, upon this liability, is not clear.

(b) *Wife's torts during marriage.*—A husband is liable, without limit as to amount, for his wife's torts committed *during* marriage, except in the case of a fraud connected with a contract or any other tort which is in substance a breach of contract. If it is intended to hold the husband liable, he should be made a defendant with her. His liability comes to an end if, before judgment against him, the marriage is dissolved by the death of either party, or by a decree absolute for dissolution, or if a judicial separation is decreed. He is not liable for her torts committed while they are judicially separated ; but the fact that they are living apart under a separation agreement does not absolve him. He has no right of indemnity against her separate property, as in the case of his liability in respect of her ante-nuptial torts. But this subject has already been adequately discussed in an earlier volume (Vol. I., pp. 440-441).

## NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Sir Frederick Pollock, "*Law of Torts*," or Sir John W. Salmond, "*Law of Torts*." Many of the cases referred to in the preceding pages and below will be found in Professor Kenny's "*Cases on the Law of Tort*." The law will be found succinctly stated in "*Digest of English Civil Law*," pp. 350-357.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

- Wilson v. Tumman* (1843) 6 *Man. & G.* 236.  
*Hilberry v. Hatton* (1864) 2 *H. & C.* 822.  
*Ellis v. Sheffield Gas Consumers Co.* (1853) 2 *E. & B.* 767.  
*Holliday v. National Telephone Co.* [1899] 2 *Q. B.* 392.  
*Hardaker v. Idle District Council* [1896] 1 *Q. B.* 335.  
*Quarman v. Burnett* (1840) 6 *M. & W.* 499.  
*Donovan v. Laing* [1893] 1 *Q. B.* 625.  
*Storey v. Ashton* (1869) *L. R.* 4 *Q. B.* 476.  
*Jefferson v. Derbyshire Farmers Ltd.* [1921] 2 *K. B.* 281.  
*Lloyd v. Grace Smith & Co.* [1912] *A. C.* 716.  
*Limpus v. London General Omnibus Co.* (1862) 1 *H. & C.* 526.  
*Joseph Rand Limited v. Craig* [1919] 1 *Ch.* 1.  
*Engelhart v. Farrant* [1897] 1 *Q. B.* 240.  
*Ricketts v. Tilling* [1915] 1 *K. B.* 644.  
*Goff v. Great Northern Railway Co.* (1861) 3 *E. & E.* 672.  
*Seroka v. Kattenburg* (1886) 11 *Q. B. D.* 177.  
*Cuenod v. Leslie* [1909] 1 *K. B.* 880.]



## CHAPTER XX.

TORTS IN RESPECT OF THE PERSON AND  
THE REPUTATION.

WE are now in a position to examine briefly the most important of the numerous particular torts which our law has evolved in the process of some centuries. It has been pointed out that, whereas "particular contracts are merely examples of the typical or normal contract . . . particular torts are the only torts which there are ; the typical or normal tort does not exist." Each one has its own history, but this is not the place in which to trace it. A few general words, however, seem necessary. The history of the law of torts is the history not of rights but of remedies ; "and indeed," said Chief Justice Holt in the great case of *Ashby v. White* (1703), 2 Ld. Raymond 938 ; 3 *id.* 321 ; 1 Smith's Leading Cases, a case the study of which will reward the attention of any person seeking a knowledge of the law of torts, "it is a vain thing to imagine a right without a remedy ; for want of right and want of remedy are reciprocal." *Ubi jus, ibi remedium* would perhaps be truer in the inverted form : *ubi remedium, ibi jus*. And remedies mean writs, *i.e.* writs of summons ; so it comes about that the history of our law of torts is mainly the history of the reproductive processes, if one may use a biological metaphor, of a very few writs.

(i) Above all in importance, though not in

antiquity, stands the Writ of *Trespass*, called by Maitland “the fertile mother of actions.” From it, and from its first offspring the Writ of *Trespass on the Case* (better known simply as ‘Case’), which the Clerks of the Chancery (the office of the Chancellor) were directed by the Statute of Westminster II. (1285) to frame and issue to applicants *in consimili casu*, i.e., in cases analogous to, though not the same as, those covered by existing writs and particularly *Trespass*, we can derive at least the following modern torts: trespass to the person, to land and to goods; trover and conversion; (to some extent) nuisance and libel; and actions founded on negligence. And, through the action of *Assumpsit*, *Trespass* is also responsible for the ordinary remedy of an action for damages for breach of contract.

(ii) The writs of *Replevin* and *Detinue* have each its own separate history.

(iii) In other cases, some particular statute gives rise to a writ for the purpose of making use of the remedy prescribed; for instance, Conspiracy and Malicious Prosecution, Seduction and Procuring Breach of Contract, all have, at any rate in part, a statutory origin.

(iv) Another source of tort is sometimes the criminal law, a civil remedy growing up out of, and by the side of, an older criminal one, e.g., Maintenance and Champerty, and to some extent Libel. But *Trespass* and *Case* overshadow all in importance; and *Case* became to a large extent a residuary form of action which tended to absorb actions originating from other sources.

We shall now consider :

1. Torts in respect of the Person and the Reputation (Chapter XX.).
2. Torts in respect of Land and Personal Chattels (Chapter XXI.).

### 3. Miscellaneous Torts, *i.e.*, Negligence, Deceit, Malicious Prosecution, Maintenance, Procuring Breach of Contract, Conspiracy, and Seduction (Chapters XXII. and XXIII.).

## TORTS IN RESPECT OF THE PERSON.

The torts usually classified as being committed in respect of the person are (1) Assault, (2) Battery, (3) False Imprisonment, and (4) Intentional Bodily Harm not classified as one of the foregoing. Personal injury may also be the result of a breach of duty or negligence (*e.g.*, careless driving), which we shall discuss later (see pp. 373–388). Assault, Battery, and False Imprisonment are all kinds of Trespass.

(1) *Assault* is an attempt or threat to injure the body of a person, without his consent, by one who appears to him to have both the intention and the ability to carry out his attempt or threat; as where one, who is in a position to do harm to another, lifts his cane or his fist, threatening to strike him, or strikes at him but misses him.

Some motion on the part of the defendant is essential; and a purely passive policeman who prevents me from entering a room by behaving like a door or a wall does not assault me. Actual contact is not necessary to an assault; but the defendant must have been in such a position that he had a present, or immediately future, ability to effect a contact if he persevered. To constitute assault, a threat must not be accompanied by a condition, *e.g.*, “Were it “not Assize time, you would become acquainted “with my sword,” which deprives the words of their menacing character. Pointing an unloaded fire-arm at a person who sees it and believes it to be loaded is, according to the better opinion, an assault.

(2) *Battery* (now very commonly called Assault) is

the wilful touching of a person, however slightly, against his will; as by throwing water over him, or spitting on him, or striking him with any missile, or wounding him. The accidental wounding of a person does not constitute a battery if the wounder is engaged in doing a lawful act in a careful and proper manner. Thus in *Stanley v. Powell* [1891] 1 Q. B. 86, where a gamekeeper was accidentally and without carelessness shot by a member of a pheasant-shooting party, it was held that the injury was not actionable. In battery, the touching (for there must be actual contact) may be either wilful or negligent. In the latter case, the action is often called “an “action founded on negligence”; but “where the “act is wrongful, either as being wilful or as being “the result of negligence, an action of battery will “lie” (*Holmes v. Mather* (1875) L. R. 10 Ex. 261, and *Stanley v. Powell*, *supra*).

Both in assault and battery some hostility is essential; thus the ordinary jostling that one expects in a crowd is not battery, nor is touching a man’s arm to attract his attention.

*Defences to action for assault or battery.*—An act which would otherwise amount to an assault or a battery may be justified on the following grounds: (i) that it was done in the defence of the person of the defendant or of certain others, or in the defence of his land or personal chattels, within the limits and in the circumstances already defined (see pp. 283–284); (ii) that it consisted of the moderate chastisement by a parent of his child, or by a master of his apprentice (although a master would hardly be well advised to exercise this remedy now), or by a schoolmaster of his pupil by way of delegation of the parent’s authority (and the delegated authority is not confined to offences committed within the four walls of the school); (iii) that it was done in the course of a



justifiable arrest (see False Imprisonment). And (iv). by the Offences against the Person Act, 1861, ss. 42 to 45, when a person charged with an assault or a battery before a court of summary jurisdiction is convicted, and suffers the punishment inflicted, or if the complaint is dismissed and a certificate of its dismissal is delivered to him, he is thereby released from civil proceedings in respect of the same assault, whether instituted by the prosecutor or by any other person, such as the husband of the person assaulted. But a master may be sued in respect of an assault committed by his servant in the course of his employment; although the servant has been convicted and punished for the offence.

(3) *False (i.e. wrongful) imprisonment* consists of totally restraining, by force or show of authority, the liberty of another for any period, however short, and is *primâ facie* actionable, unless the defendant can show that he acted in exercise of some sufficient legal authority. The remedies of the person wronged include, in addition to an action for damages and for an injunction and the exercise of force in self-defence, the powerful prerogative writ of *habeas corpus* (see pp. 665–668). The wrongful restraint need not necessarily be by an officer of the law or in a prison or gaol; as was said by the Chief Justice of the King's Bench in 1348: "there is an imprisonment in every case where a man is detained forcibly and against his will; whether he be imprisoned in a house or in the open street or elsewhere." Thus railway companies have in several cases been held liable for detaining passengers on the suspicion, which has turned out to be mistaken, that they were travelling without having paid the proper fare; and railway police are usually regarded as the servants of the railway company, unless the company's private Act of Parliament negatives this relationship.

Actual contact is not necessary to constitute false imprisonment; and it is sufficient that the plaintiff, realising that force will be applied to him if he were to resist, should bow to the inevitable. "I should think it an imprisonment," said Best, C.J., "if a constable told me that I must go to (the police station); for I should know that if I refused, he would compel me."

As in the case of Assault and Battery, it is not necessary for the plaintiff in False Imprisonment to prove any actual damage. All three actions are actions of Trespass, of which the absence of the necessity of showing actual damage is a general characteristic. But the reverse was the rule in actions of Trespass on the Case, and still is in the case of nearly all torts deriving their origin from this source.

*Defences to action for false imprisonment.*—An act which would otherwise be a false imprisonment, may be justified by any of the defences which are available in justification of assault or battery; and the operation of the general defence of *volenti non fit injuria* requires special mention. Thus, a miner who goes down the pit impliedly consents to limit himself to the use of the normal means of egress from the mine, and at the usual times; and there is no false imprisonment if he is denied permission to ascend at an abnormal time, *e.g.*, in the middle of his shift. A workman in a factory where it is the custom to lock the yard gate until the end of a shift is in the same position (*Herd v. Weardale Co.* [1915] A. C. 67).

The legal authority justifying an imprisonment may be the order of a Judge or the warrant of a magistrate. The governor of a gaol has been held liable for detaining a prisoner without a proper warrant, or after his acquittal; and a constable is not justified in arresting and detaining an innocent person in order to protect him, against his consent,

from unknown persons from whom the constable believes him to stand in danger.

*Arrest without warrant.*—(a) In cases of *felony*, a constable may arrest a person without a warrant if he has reasonable and probable cause for believing that a felony has been committed, and that the person arrested committed it. But a private person, in order to justify an arrest without a warrant (and it is not usual to issue warrants to private persons), must prove (i) that *the particular felony* on which the charge is based was in fact committed, and (ii) that he had reasonable and probable cause for suspecting that the person arrested committed it. This distinction is brought out in the case of *Walters v. W. H. Smith & Son, Limited* [1914] 1 K. B. 595. Then it is the duty of the constable or the private person, having effected the arrest, to bring the offender before a magistrate at the earliest opportunity. And both a constable and a private person may use necessary force to prevent a felony from being committed. (b) In cases of *misdemeanour*, neither a constable nor a private person is entitled at Common Law to arrest without a warrant; but there are a number of statutes authorising arrest without warrant in certain cases, *e.g.*, rogues and vagabonds, night offenders, etc. (see Vol. IV., pp. 270–273). (c) In cases of *breach of the peace*, both a constable and a private person may arrest, or use other force against, the breakers in order to terminate it or prevent its renewal.

False imprisonment with a view to a criminal prosecution must not be confused with Malicious Prosecution and Malicious Arrest, which will be explained in due course (see pp. 394–398).

(4) *Intentional bodily harm.*—It is also a tort intentionally and without lawful excuse to cause bodily harm to another; although it may not amount

to one of the three forms of Trespass considered above, or involve a breach of a duty to take care of the kind to be discussed later as giving rise to an action founded on Negligence. For instance, in *Wilkinson v. Downton* [1897] 2 Q. B. 57, the defendant, moved by a curious sense of humour, falsely informed the plaintiff that her husband had met with an accident, and was lying at a certain place with both legs broken. The plaintiff hastened thither to bring her husband home, spending a small sum on her railway fare, only to find that the information was quite false and her husband quite safe; nevertheless the shock produced by the information made her seriously ill. On suing the defendant, she recovered the amount of the railway fare as damages for Deceit, and £100 in respect of her illness for damage resulting from a wilful and intentional infringement of her right to personal safety, committed without just cause or excuse. This cause of action has recently received another illustration, and has been approved by the Court of Appeal (*Janvier v. Sweeney* [1919] 2 K. B. 316).

*Nervous shock*.—And these cases, with others, also show that, while purely mental anguish cannot give rise to a cause of action (though it may be relevant in certain cases in the assessment of damages, as in the case of a parent suing for the seduction of his daughter), yet a shock or a fright which is the natural consequence of the defendant's unjustifiable act, and upon which physical injury ensues, may give rise to a cause of action, even when there is no accompanying physical impact.

#### TORTS IN RESPECT OF THE REPUTATION.

*Definition*.—Defamation of the reputation of another takes the form of Libel or of Slander. *Libel* is the publication, without lawful excuse, by the defendant



to a third person, of an untrue and defamatory statement regarding the plaintiff, by means of printing or writing, or a picture, or some other permanent means. *Slander* is a similar publication by word of mouth or by gesture or some other transient means, and differs from libel in several other respects to be discussed in due course.

A person's reputation is what other people think of him; and not what he thinks of himself. The law protects reputation; but gives no civil redress for wounding a man's self-esteem. Thus it is not actionable (though libel may be the subject of a criminal prosecution (see Vol. IV., pp. 191–195)) to write or speak in terms of abuse or disparagement, however gross and malicious, to the person only whose character is being attacked; because the attack cannot affect the opinion which other people, to whom it is not communicated, hold of the person attacked. To constitute an injury to reputation, it is therefore essential that the charge made should be communicated, or, to use the proper technical expression, *published*, to at least one person other than the person whose character is attacked.

The published statement must be both defamatory and untrue. Any statement is defamatory of a person which exposes him to the hatred, ridicule, or contempt of others, or which tends to injure him in his office, profession, or trade. A statement may be defamatory in its natural and ordinary meaning, or, though innocent in such meaning, may, owing to circumstances known to the persons by and to whom it was made, be understood in a secondary sense which is defamatory. Where the complaint is, that words, innocent in their ordinary meaning, were intended to convey, and did convey, a defamatory imputation, the imputation complained of is technically called the *innuendo*. In such cases, the plaintiff

is required to set out in his statement of claim the *innuendo* of which he complains. For instance, in a case where the defendants had issued a circular to their customers stating that “they will not receive “in payment cheques drawn on any of the branches” of the plaintiff banking company (a statement which is not defamatory in its ordinary sense), the plaintiff’s *innuendo* was as follows: “meaning thereby, that “the plaintiffs were not to be relied upon to meet “the cheques drawn upon them, and that their position was such that they were not to be trusted “to cash the cheques of their customers.” At the trial it is for the judge to decide whether the words used by the defendant are reasonably capable of bearing the *innuendo* alleged; while, if they are, it is for the jury to say whether they did in the circumstances in fact convey the meaning complained of. Thus, in the case of the statement just quoted, the House of Lords held that the plaintiffs had a right to have the matter submitted to a jury to say whether in the circumstances the statement was actually defamatory or not (*Capital and Counties Bank, Limited v. Henty* (1882) L. R. 7 App. Ca. 741).

*Differences between libel and slander.*—The following are the main differences.

(i) As mentioned above, an action for libel lies for the publication of defamatory matter in writing or printing, or by a picture, caricature or effigy, or in any other permanent mode, and an action for slander for the publication of defamatory matter by spoken words, or by gesture, or in any other transient mode. There seems to be no reason to doubt that defamation arising from the resemblance to the plaintiff of a character portrayed in a cinematograph film, would be libel.

(ii) A libel is actionable although the plaintiff may not have suffered any actual loss or damage, while a slander is not (except in the cases specified below)

actionable without proof of actual loss or damage ; and therefore the plaintiff in an action of slander must (except in these cases) prove that he has suffered some definite temporal loss as the natural and probable consequence of the publication by the defendant of the words complained of. The following slanders, however, are actionable *per se*, that is, without proof of actual loss or damage :—(1) where the words charge the plaintiff with having committed a criminal offence for which he would be liable to imprisonment, which means more than liability to be arrested, *e.g.*, for the offence of travelling on a railway without a proper ticket ; (2) by the Slander of Women Act, 1891, where they impute unchastity or adultery to a woman or girl ; (3) where the words are spoken of the plaintiff in relation to an office of profit which he holds, or a profession or trade which he carries on, and tend to prejudice him in such occupation by imputing unfitness to discharge his duties or carry on his business, or any misconduct therein. But the words, to be actionable, must be spoken of the plaintiff in the way of his calling ; thus, as Swinfen Eady, L.J., said in a recent case (*Jones v. Jones* [1916] 1 K.B. 351 ; [1916] 2 A. C. 481), “ to say of a physician that he had debauched a lady patient would be actionable *per se*. “ But to say that he had committed adultery . . . “ or was of general immoral behaviour, would not be “ actionable *per se*.” (An exception, however, to the rule that an allegation of immoral behaviour must, to be actionable *per se*, be imputed to the plaintiff in connection with his occupation, occurs when he is a clergyman holding clerical preferment or employment of temporal profit) ; (4) where the words relate to an office, which is not an office of profit, and impute such misconduct as would be a ground for the plaintiff’s removal from that office ; (5) where the plaintiff is a trader, words imputing insolvency to him ; (6) where

they impute that the plaintiff is suffering from a contagious and disgraceful disease.

(iii) An action for libel must be brought within six years from the date of publication ; whereas an action for slander which is actionable by reason only of actual loss or damage, may be brought within six years from the time the damage was sustained, while for a slander actionable *per se*, the action must be brought within two years from the time of publication.

(iv) The publication of a libel may be punishable as a misdemeanor by fine or imprisonment, on criminal proceedings by way of indictment or information ; but slander, as such, is never a crime, although spoken words, if blasphemous, obscene, or seditious, are within the criminal law (see Vol. IV., pp. 153–154, 169).

*Publication.*—In an action for libel or slander, the plaintiff must plead and prove the publication of it by the defendant to some person other than the plaintiff himself, or the defendant's wife or husband ; for husband and wife are, for this purpose, deemed in law to be one person. But publication to the plaintiff's wife, and, possibly, to the plaintiff's husband, is sufficient publication for the purposes of an action. The following are examples of the publication of a libel :—(1) where the writer of a letter containing a libel gives it to his clerk to make a copy of it ; (2) where the libel is contained in a telegram which the Post Office officials must necessarily read, or in a post card which they may read. But there is no presumption that postal officials or domestic servants will open and read the contents of an envelope which is not gummed up ; and the fact, as proved, that a domestic servant of the addressee of a letter opened and read such a letter, in breach of duty and out of curiosity, does not constitute publication ; (3) where the defendant writes and sends a letter to the plaintiff in such circumstances that, to the defendant's knowledge, it is likely to be



opened and read by the plaintiff's clerk, which in fact happens. But when a letter is opened and read by a person other than the addressee, not being a person likely to the writer's knowledge to open the letter, there is no publication to such person ; (4) where it is contained in a newspaper or book, the delivery of the libellous manuscript to the printer, and the delivery of each copy on sale or otherwise, constitute a separate publication, unless the defendant can show (as a newsvendor generally can show) that he did not know that the paper or book contained a libel, and that his ignorance of the fact was not due to negligence.

Publication may be either intentional (which is the usual case), or negligent, for instance, when the proprietors of a circulating library carelessly put into circulation a book containing a libel (*Vizetelly v. Mudie's Select Library* [1900] 2 Q. B. 170). Unless the occasion is privileged, the intention with which the words complained of were published is immaterial, except as affecting the amount of damages which the jury may give ; and, although it is customary to plead in the statement of claim that the defendant published the defamatory statement 'falsely and maliciously,' neither of the elements need in fact be proved, unless they become relevant owing to a plea of justification or qualified privilege.

It is no excuse for the publication of a libel, that the defendant honestly believed in its truth, or published it by mistake, or in jest, or even that the defendant was unaware of the plaintiff's existence and used his name in a purely imaginary manner. It is sufficient that the words complained of were such as to lead ordinary readers who knew the plaintiff to think that they referred to him (*Hulton & Co. v. Jones* [1910] A. C. 20).

*Defences to libel and slander.*—There are three

principal defences to an action of Defamation: Justification, Privilege, and Fair Comment.

(i) *Justification*.—To ‘justify’ in this connection means to plead and prove the truth of the statement complained of. A defamatory statement, though cruel or malicious, is not actionable if true in substance and in fact. It may afford the person aggrieved a good ground for instituting criminal proceedings against the publisher of the libel; because a person indicted for the publication of a criminal libel, who relies by way of defence on its truth, must show not only that it was true, but also that its publication was for the public benefit (see Vol. IV., pp. 191–195). But the law gives no civil redress to a person aggrieved by the publication of a defamatory statement which is true. He cannot seek to recover damages for injury to a good reputation which he does not, or ought not to, enjoy. The law, however, presumes in favour of the person defamed that anything defamatory of him is untrue; unless and until the contrary is pleaded in the defence, and the defendant at the trial succeeds in proving that the statement complained of is true in substance and in fact.

And upon such a defence, when the statement complained of is an allegation as to the character or tendencies of the plaintiff, it is open to the defendant to give evidence of facts, which occurred within a reasonable time after the publication, in support of his allegation; for instance, upon an allegation that a man was addicted to excessive drinking, it would be a relevant fact that “on the day after the publication of the allegation the man had suffered from *delirium tremens*.”

(ii) *Privilege*.—Occasions on which the publication of defamatory matter is privileged are of two kinds: (a) occasions of *absolute* privilege, where, on grounds of public policy, no action will lie, however malicious the statement may be. Such occasions arise when

statements are made in the course of Parliamentary debates or proceedings, or of judicial, naval, or military proceedings, or in reports published by the order of either House of Parliament. The absolute privilege attaching to judicial and quasi-judicial proceedings protects statements by judge or jury, counsel or solicitor, parties or witnesses in the ordinary course of the proceedings, including the preliminary examination of a witness by a solicitor for the purpose of preparing his proof. And the Law of Libel Amendment Act, 1888, s. 3, has conferred upon fair, accurate, and contemporaneous newspaper reports of public judicial proceedings, not being obscene or blasphemous, a degree of privilege which according to the better opinion is absolute; that is, that the defence cannot be rebutted by proof of malice or improper motive.

(b) The second kind of privileged occasion is that of *qualified* privilege, where, if the statement was made in such a way as not to exceed what was reasonably necessary for the occasion, no action will lie; unless the plaintiff can prove that the defendant acted maliciously, that is, in bad faith or from any improper or indirect motive, such as spite. The defence is then said to be rebutted by proof of *express malice*, *i.e.*, actual malice, in contrast with the purely formal allegation of malice contained in the plaintiff's statement of claim ('falsely and maliciously published'). The following statements are made on occasions of qualified privilege: (1) statements made in discharge of a legal, moral, or social duty, whether public or private, or for the protection of a lawful interest of the recipient of the communication or only of the person making it. A common illustration is a communication made as to the character of a servant, or as to the solvency of a trader to whom the inquirer proposes to give credit. But it seems that this protection does not apply to the statements of a

trade protection society working for profit; though, in the case of a mutual association of traders not working for profit, the rule is different. Another example of a statement which was held to have been made on an occasion of qualified privilege is an unsolicited communication to a ship-owner of a letter received by the defendant, alleging that the plaintiff, the captain of one of the ship-owner's vessels, was constantly drunk. And, when an occasion is privileged, "the use of the ordinary and reasonable means of giving effect to the privilege does not destroy it." Thus, when a solicitor writes a letter which is reasonably necessary in the discharge of his duty to his client, that occasion is privileged; and he does not lose that privilege because he dictates the letter to a clerk and then hands it to another clerk to preserve a copy of it; (2) statements made in self-defence to rebut charges made against the defendant; (3) statements made to a public servant or official with the object of redressing a public grievance, or punishing or preventing a crime.

The following *newspaper* reports also have qualified privilege: (1) the report of judicial proceedings, if fair and accurate, though not published contemporaneously with such proceedings, in which latter case, as we have already seen, the privilege is believed to be absolute; (2) the report of proceedings in Parliament, if fair and accurate; (3) the report of proceedings of a lawful public meeting, or of any meeting of a town council, board of guardians, or other local authority, or of a vestry, if it is a fair and accurate report of a matter of public interest, the publication of which is for the public benefit, and it is not blasphemous or indecent, and the proprietor of the newspaper has not, after request, refused to insert in it a reasonable letter by way of contradiction or explanation of the report. But in all these cases, as in others of



qualified privilege, that defence may be rebutted by proof of malice or improper motive on the part of the defendant.

(iii) *Fair comment*.—A statement, though defamatory and untrue, is not actionable if it is a fair comment on a matter which is of public interest, or has been submitted to the judgment of the public; such as the public conduct of any person who takes part in public affairs, or something pertaining to literature, art, music, the drama, or public entertainments. The statement must be *comment*, that is to say, criticism or the expression of opinion on facts which are substantially true; for, as has been pointed out, unless a critic has got his facts right, it is difficult to see how his comment can be fair. The comment must be *fair*, which does not mean that it must be a correct appreciation of the matter, but that it must be the honest expression of the defendant's opinion, and the opinion must be relevant to the matter criticised, and not go beyond the limits of what may fairly be called criticism. Criticism must not be used as a cloak for mere invective, or for personal imputations not arising out of the subject-matter of the criticism, or not based on fact.

It is for the judge to decide whether the matter commented on is a matter of public interest, and whether the comment is reasonably capable of being found by the jury to go beyond the limit of fair criticism. If there is some evidence from which the jury can find that the comment is unfair, it is for the jury to find whether it is so in fact. If malice in the defendant is proved, "it must be for the jury to say "whether it has warped his judgment" and made the comment unfair; but it does not, it is believed, automatically destroy the defence of fair comment, as it does in the case of a defence of qualified privilege. As we have said, the statement must be comment, that is, a statement of opinion, not a statement of

fact ; but, in view of the difficulty which frequently arises of disentangling statements of fact from statements of opinion, it is becoming common to adopt a mixed defence of justification (as to the facts) and fair comment (as to the opinion).

*Libel Act, 1843.*—In an action for a libel contained in a newspaper or other periodical publication, there is a further defence which is not available in other libel actions, namely, an apology under the Libel Act, 1843, and payment into court by way of amends. In such an action, it is a good defence that the libel was inserted without actual malice and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, a full apology was inserted. When the plea of apology is filed, money must be paid into court by way of amends ; and in this, as in any other action of libel, the payment of money into court operates as an admission of liability.

*Slander of Title and of Goods.*—Akin to libel and slander, though differing in historical origin and in the conditions of liability, are two torts usually called Slander of Title and Slander of Goods. These occur when a person makes oral or written statements, which are untrue and malicious and produce actual damage, in disparagement of the title of another to real or personal property (‘slander of title’) or of another’s goods or his trade or business (‘slander of goods’). Examples of disparaging statements of this kind are statements:—that the plaintiff had been restrained by injunction from disposing of his shares in a company owing to a defect in his title ; that by reason of the birth of issue to a certain person the plaintiff ceased to be entitled to property under a will ; that the plaintiff had retired from business ; that the plaintiff is manufacturing and selling goods in infringement of the defendant’s patent ; or that a

wooden paving laid by the plaintiffs, a firm of rival pavement contractors, is “now in a rotten condition.” But, in all these cases, it is essential for the plaintiff to prove not only falsity but actual damage and actual malice or improper motive; the allegation of malice not being, as it is in the case of Libel and Slander, except in rebutting a plea of qualified privilege, a mere matter of form.

Disparaging statements are often the result of trade rivalry; and, in these cases, it is necessary to make a certain allowance for mere tradesman’s puff (*simplex commendatio*), and also to draw a distinction between an assertion by the defendant that his goods are “the best on the market,” or even “superior to” the plaintiff’s (statements which would in general not be actionable), and allegations that the plaintiff’s goods are actually bad or defective in some quality (statements which, if untrue and malicious and producing damage, are usually actionable) (*Alcott v. Millar’s Karri and Jarrah Forests, Limited* (1905) 21 T. L. R. 30).

Another necessary distinction is, between untrue statements which disparage a person in respect of his trade or business (which may amount to Defamation, in which case they need not be malicious nor, except in certain cases of Slander, produce actual damage), and statements which disparage his trade or business itself or his goods (in which case they must, to be actionable, be malicious and produce actual damage).

Slander of goods was described by Lord Bowen in *Ratcliffe v. Evans* [1892] 2. Q. B. at p. 527 as “an action on the case for damage wilfully and intentionally done without just occasion or excuse, “analogous to an action for slander of title”—which at once explains the necessity in the case of this action for proof of actual damage.

## NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter the student should refer to Sir Frederick Pollock, "Law of Torts," or Sir John W. Salmond, "Law of Torts." Many of the cases referred to in the preceding pages and below will be found in Professor Kenny's "Cases on the Law of Tort"; and the law will be found succinctly stated in the "Digest of English Civil Law," pp. 431-454, 501-528.

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

- Innes v. Wylie* (1844) 1 C. & K. 257.  
*Holmes v. Mather* (1875) L. R. 10 Ex. 261.  
*Stanley v. Powell* [1891] 1 Q. B. 86.  
*Warner v. Riddiford* (1858) 4 C. B. N. S. 180.  
*Meering v. Grahame-White Aviation Co.* (1919), 122 L. T. 44.  
*Herd v. Weardale Steel Co.* [1915] A. C. 67.  
*Walters v. W. H. Smith & Son* [1914] 1 K. B. 595.  
*Wilkinson v. Downton* [1897] 2 Q. B. 57.  
*Capital & Counties Bank v. Henty* (1882) 7 App. Ca. 741.  
*Jones v. Jones* [1916] 2 A. C. 481.  
*Pullman v. Hill* [1891] 1 Q. B. 524.  
*Edmondson v. Birch* [1907] 1 K. B. 371.  
*Vizetelly v. Mudie s Select Library* [1900] 2 Q. B. 170.  
*Hulton & Co. v. Jones* [1910] A. C. 20.  
*Stuart v. Bell* [1891] 2 Q. B. 341.  
*McGuire v. Western Morning News* [1903] 2 K. B. 100.  
*Thomas v. Bradbury, Agnew & Co.* [1906] 2 K. B. 627.  
*White v. Mellin* [1895] A. C. 154.  
*Fox's Libel Act*, 1792.  
*Libel Act*, 1843.  
*Law of Libel Amendment Act*, 1888.]
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## CHAPTER XXI.

## TORTS IN RESPECT OF LAND AND CORPOREAL CHATTELS.

## TORTS IN RESPECT OF LAND.

Under this head we shall deal with Trespass, Dispossession, and Nuisance.

1. TRESPASS (called trespass *quare clausum fregit*) is the unjustifiable interference with another's possession of land. The mental element in this tort is reduced almost to vanishing point. There need be no malice or breach of special duty ; but there must be a voluntary act. If while walking on the highway I am tossed by a bull over the hedge into your field, I do not commit trespass. But if while out walking, I inadvertently enter your land, not knowing the boundary, I am a trespasser. Mr. Justice Oliver Wendell Holmes, of the Supreme Court of the United States, in his *Lectures on the Common Law* (p. 153), has put it as follows : " A man may go through the " motions of walking without legal peril, if he chooses " to practise on a private treadmill ; but if he goes " through the same motions on the surface of the " earth, it cannot be doubted that he knows that the " earth is there. With that knowledge, he acts at " his peril in certain respects. If he crosses his " neighbour's boundary, he is a trespasser."

The interference may be with the surface of the land, or with what is underneath it, *e.g.*, working and winning another's coal, or with the air-space above

it ; though the upward limits of the maxim : *cujus est solum ejus est usque ad cælum (et ad inferos)* have not yet been precisely defined. No actual damage need be proved ; for, as Lord Camden said in the famous case of *Entick v. Carrington* (1765) 19 State Trials, 1029 : “ by the laws of England every invasion “ of private property, be it ever so minute, is a trespass. “ No man can set his foot upon my ground without “ my licence but he is liable to an action, though the “ damage be nothing.”

*Trespass ab initio*.—If a man has an authority, conferred directly by law, to enter land for a particular purpose, he commits a trespass by using the land or premises for any purpose beyond that authorised ; and the abuse of his authority relates back to the original entry, and he is deemed to be a trespasser *ab initio*. Such, for instance, is the right to enter into a common inn, the right of a reversioner to enter and see if waste is being done, the right of a commoner to enter upon land to see his cattle, and the right of a landlord to distrain for rent (*Six Carpenters' Case* (1610) 8 Co. Rep. 146a ; 1 Smith's Leading Cases) ; but, in the case of landlords, the Distress for Rent Act, 1737, has removed the risk of becoming a trespasser *ab initio* by reason of subsequent irregularities committed in regard to the distress after a lawful entry (see pp. 426–427). The abuse of the authority, if it is to have this retrospective effect, must consist of some actual malfeasance, and not a mere omission, *e.g.*, the omission of the six carpenters to pay for their second quart of wine and a pennyworth of bread did not make them trespassers *ab initio*.

On the other hand, when the defendant enters under the authority of the plaintiff (‘ leave and licence ’), then the defendant's wrongful act does not relate back to his original entry, and make it trespassory ; and he is not liable as a trespasser in respect of his

original entry, whatever may be his liability for tortious acts subsequently committed.

*Who may sue.*—Trespass is a wrong to possession ; and it is the person in possession who is entitled to sue for trespass, whether or not he be the owner, and whether or not his possession be lawful. “Any possession is a legal possession against a wrong-doer” ; but not, of course, against a person entitled to possession. And so a defendant to an action for trespass may plead and prove that he is entitled to possession, which is called “a plea of soil and freehold” ; that is, he may plead “I have a better right to possession than you have.” But he may not plead : “A. B. has a better right to possession than you have” (*jus tertii*), unless he goes on to allege and prove that he entered the land under A. B.’s authority, *e.g.*, under a lease from A. B. (And the same principles apply, generally speaking, to the tort of Trespass to goods). A reversioner, *e.g.*, a landlord, or a remainderman, cannot bring Trespass against strangers (except upon a tenancy at will, in which case either the tenant or the landlord can bring Trespass) ; but where permanent injury is done to the land so as to diminish the value of the reversion or the remainder, an action to recover the damage (formerly an ‘action on the case’) is available to the reversioner.

*Defences to an action for trespass.*—An act which *primâ facie* amounts to a trespass may be justified in a number of ways on the ground of an authority to enter, granted either (a) by the plaintiff, or (b) by the law itself.

(a) *By leave and licence of the plaintiff.*—A person may justify his presence on the land or premises of the plaintiff by proving that the plaintiff himself permitted or even invited him to go there, for instance, for valuable consideration paid to the plaintiff to

enable him to see a horse-race or a dramatic performance, or upon lawful business such as to buy goods in the plaintiff's shop, or effect some repairs in his house, or merely as a social guest; and the exact capacity in which he comes, whether for valuable consideration or on lawful business, or as mere licensee, or as a trespasser, is, as we shall see later (pp. 377-379), very material in determining the nature of the duty in respect of his personal safety which is owed to him by the occupier. But the present point is, that a person who enters under licence cannot be sued in Trespass; and the next question is, in what circumstances the plaintiff may revoke his permission or 'licence,' as it is usually called, and how the defendant is placed as the result of its revocation. (i) If the licence is a mere licence, it is revocable at the pleasure of the licensor, *e.g.*, a miller gratuitously gives me permission to fish in his mill-stream. He can revoke the licence at pleasure; but the licensee has a reasonable time in which to remove himself and his goods from the land. (ii) If the licence is "coupled with, or "granted in aid of, a legal interest," it is not revocable during the existence of that interest; *e.g.*, I buy standing timber from a man with permission to enter and fell and take it away, he cannot revoke the licence before the lapse of a time reasonably sufficient to enable me to do so. (iii) If the words of the licence are such as to create an irrevocable demise of the land, it is not revocable except upon the terms of the demise. (iv) If the licence is given for valuable consideration, although not amounting to demise, *e.g.*, a ticket of admission to a theatre, then it seems to comprise a contract that, so long as the licensee behaves himself in a proper manner and conforms to the licensor's regulations, the licence will not be revoked. Thus, when a person, having bought a ticket of admission to a cinema theatre, was called



upon to leave the theatre on the ground that he had no ticket, and, upon refusing to go, was forcibly removed. it was held that he was entitled to recover damages for assault and battery and false imprisonment (*Hurst v. Picture Theatres Limited* [1915] 1 K. B. 1), and would have been entitled to damages for assault and battery, even if the force used had been confined to the amount necessary to remove him, and so justifiable in the case of a trespasser. But the exact effect of this decision is far from clear.

(b) *Under an authority conferred by law.*—Of this there are many illustrations ; e.g., entry into a common inn ; by a landlord to distrain for rent ; by a reversioner to see if waste be done ; by a commoner to see his cattle ; by an officer of the law to execute legal process against person or property ; to retake goods which the possessor of the land has wrongfully taken and placed there ; to abate a nuisance in certain circumstances ; to prevent murder or to avoid some imminent danger ; in the exercise of a public right of way as on a highway. But fox-hunting, at any rate when the object is sport and not merely the destruction of a noxious animal, does not justify entry upon the land of another without his express licence. And an owner of land out of possession may re-enter peaceably and take possession (pp. 410-411).

*Trespassory user of the highway.*—Reference has already been made to the law governing highways from a public point of view (see Vol. I., pp. 539-547). And it should be noted that the right of the public is to pass and repass upon it, and use it for the ordinary purposes of a highway, including, it seems, reasonably incidental purposes such as sitting down to rest, stopping to admire the scenery, sketching, etc. Subject to that right, "the soil and every right "incident to the ownership of the soil" is in the owner or owners of the subjacent land, or any persons to

whom it may have been conveyed by them, or in whom it may have been vested by a statute (see Vol. I., pp. 546–547). If the highway forms a boundary between two landowners, then the presumption is, that each owns the land on his side up to the middle of the road: *usque ad medium filum viæ*. Consequently, any use of the highway which exceeds the right of passage with its reasonable incidents is a trespass; thus, for instance, the unauthorised pasturing of cattle, or the unauthorised pursuit of game on a highway (which is also a criminal offence), is a trespass. And where a person placed himself on a highway running across a grouse moor for the express purpose of interfering with the sport on the moor by preventing the birds from approaching the butts, he was held to be a trespasser, and could be lawfully removed by the use of force no greater than was necessary to remove him (*Harrison v. Duke of Rutland* [1893] 1 Q. B. 142). And a ‘racing tout’ who spent an hour and a half on the highway in order to watch the trials of race-horses, was also held to be a trespasser (*Hickman v. Maisey* [1900] 1 Q. B. 752).

*Trespass by animals.*—A man is answerable not only for his own trespass, but also for that of his cattle and other animals *domitæ naturæ*, if they stray on to another’s land; and, in such a case, he must make compensation for all damage of a kind which the particular animal is likely to do, *e.g.*, in the case of cattle, the eating of grass or cereal crops. But injury caused by a fowl which flies into the spokes of a cyclist’s wheel, or by sheep which come into collision with a motor-car, has been held to be not the natural consequence of those animals straying on the highway; and the owners of the animals were held not liable. And (i) the owner of the cattle is not liable when the occupier of the land is under a duty to keep the fences in proper repair, and the straying is partly due

to their defective condition ; and (ii) when the animals are lawfully upon a highway and stray off it on to the land of another, it is necessary for that other also to prove negligence on the part of the owner of the animals or those for whom he is responsible. For damage done by cattle or any other animal or thing straying or found doing damage on another's land, the law gives the occupier of the land a right to distrain the cattle or thing *damage feasant* ('doing damage'), till the owner makes compensation for the damage. But if the occupier distrains, he cannot, so long as he holds the distress, also maintain an action for damages (see also pp. 427-428).

Other liability for damage done by animals may conveniently be mentioned here.

(a) Animals *feræ naturæ*. A person who keeps a wild animal of a dangerous kind, *e.g.*, a lion, a bear, a monkey, an elephant, does so at his peril ; he is liable for any damage caused by it while it is in his possession or after its escape. No negligence need be proved (*May v. Burdett* (1846) 9 Q. B. 101).

(b) Animals *domitæ naturæ*. A person who keeps a tame animal is not liable for damage caused by it, unless the person injured can prove *scienter*, *i.e.*, that the owner or harbourer or other possessor of the animal, or his servant, was aware that the particular animal which caused the damage had a mischievous propensity towards causing the kind of damage done (*Cox v. Burbidge* (1863) 13 C. B. N. S. 430). Thus a man who is bitten by a dog cannot recover damages from the person who owns or possesses it, unless he can show that the defendant was aware of that particular dog's tendency to bite mankind. But by the Dogs Act, 1906, no *scienter* need be proved in the case of injury by dogs to cattle, horses, mules, sheep, goats, or swine. In fact, the dog occupies an anomalous position between wild and domestic animals.

2. **DISPOSSESSION** consists of wrongfully withholding or taking possession of land from the person lawfully entitled to it. As actual possession gives a good title to land against everybody except the rightful owner or other person claiming through him, the claimant to land can only recover it by making out a better title to it than the person who is in possession. But where the relationship of landlord and tenant, or of licensor and licensee, exists between the claimant and the person in possession, the latter is *estopped*, or prevented in law, from denying the landlord's or licensor's title; and therefore the landlord or the licensor, in order to recover possession, need only prove that the tenancy has expired or the licence been revoked.

In early times, possession of land was recovered by means of 'real' actions, *i.e.* actions in which recovery of possession was directly claimed; but, owing to their highly technical and tedious procedure, the 'personal' action of trespass *de ejectione firmæ*, or action of *ejectment*, as it was afterwards called, came to be resorted to instead of the real actions, and in 1833 real actions were (with a few unimportant exceptions) abolished by the Real Property Limitation Act, s. 36. Since the passing of the Judicature Act, 1873, the mode of proceeding in the High Court for the recovery of the possession of land, whether by a stranger or by a landlord against his tenant, has been by an ordinary action for the recovery of land, in which the plaintiff claims possession of the land. If he succeeds in the action, he can enforce the judgment by means of a writ of possession, by which the sheriff is directed to put him in possession without delay. With his claim for possession of the land, the plaintiff may (in spite of the general rule) join a claim for 'mesne profits,' that is, intermediate profits or damages in respect of the period between the defendant's wrongful entry and the date when the



plaintiff gets into possession. A landlord claiming to recover possession of land against a tenant or persons claiming under a tenant may avail himself of the summary procedure afforded by Order 3, r. 6, and Order 14, r. 1, of the Rules of the Supreme Court (see pp. 491–492).

*Value or rent not exceeding £100 or £20.*—Where the yearly value or rent of the land in question does not exceed £100, possession of land or any tenement can be recovered by action brought in a County Court; and, in order to give landlords the option of a cheaper and more speedy remedy against tenants holding over after the tenancy has expired or been duly determined, it has been provided by the Small Tenements Recovery Act, 1838, that a tenant at will, or a tenant for a term not exceeding seven years, where the rent does not exceed £20 a year, who fails to deliver up possession after his interest has ended or been duly determined, may, after being served with written notice, be ejected by warrant obtained from a court of summary jurisdiction. But the warrant will be stayed if the tenant gives security to bring an action to try his right to continue in possession, and to pay the costs in the event of his failing in the action.

*Other provisions as between landlord and tenant.*—It may be convenient to take notice here of certain other statutory provisions made to assist landlords in their remedies by action. First, by the Common Law Procedure Act, 1852, s. 209, every tenant must, on pain of forfeiting three years' rent, give notice to his landlord of any writ in ejectment delivered to him or coming to his knowledge; in order that the landlord may take the necessary steps to defend his title. Second, by s. 210 of the same Act it is provided that, if half a year's rent of any premises is in arrear, and the landlord has a right to re-enter for non-payment, and there is no sufficient distress on the premises, the

landlord may, without any formal demand of the rent, or re-entry, serve a writ in ejectment for the recovery of the premises ; and the judgment in such action is final and conclusive, unless the rent, together with the costs, is paid within six months after execution. Thirdly, by the Landlord and Tenant Act, 1730, s. 1, if any tenant wilfully holds over after the determination of the term, and after notice in writing demanding possession, an action may be brought against him for double the yearly value of the premises during the time he wrongfully detains them ; and, under the Distress for Rent Act, 1737, s. 18, any tenant with power to determine his lease, who gives notice of his intention to quit, but does not deliver up possession at the time mentioned, is liable for double his former rent for such time as he thereafter continues in possession.

The National Insurance Act, 1911, s. 68, provides for the protection of any insured person in receipt of sickness benefit against the levying of a distress or of execution, and against proceedings in ejectment or for the recovery of rent, in such circumstances as would, according to the certificate of his medical attendant, endanger his life. And it should also be noted, that at present the rights of landlords against their tenants, as to recovery of possession and in other ways, are subject to serious restrictions contained in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which was passed as the result of conditions arising out of the recent war, and will expire for the most part, unless further continued by Parliament, on the 24th June, 1923.

*Entry.*—A person entitled to the immediate possession of land may enter upon it and take possession ; peaceably if he can, but, if not, then he will not be liable civilly to the wrongful possessor if he uses only the amount of force necessary to eject the wrongful possessor and to remove his goods ; although he

may be responsible to the public in the shape of an indictment for a forcible entry under the Statutes of Forcible Entry (see Vol. IV., pp. 190–191). Thus, where the servant of a golf club refused to leave a cottage belonging to his employers, occupied by him in virtue of his service, upon receiving due notice to quit, and was ejected by persons acting on the instructions of his employers and using no more force than was necessary to remove him and his goods, his employers' right of entry proved a good defence to his action for assault and battery to himself and trespass to his goods (*Hemmings v. Stoke Poges Golf Club Limited* [1920] 1 K. B. 720).

3. NUISANCE.—A nuisance is either *public* or *private*. A *public nuisance* is an unlawful act or omission to discharge a legal duty which causes inconvenience or annoyance to the inhabitants of, or travellers through, a particular locality, or interferes with the exercise or enjoyment by them of a right common to all. So, when the solicitors forming the Society of Clifford's Inn indicted a noisy tinman who disturbed them in their professional labours, it was found that only three houses in the Inn were substantially affected, and so it was held that the noise did not constitute a public nuisance, though it might amount to a private nuisance (*R. v. Lloyd* (1803) 4 Esp. 200). A public nuisance is a misdemeanor at Common Law, punishable by indictment, or by information laid by the Attorney-General, and may be restrained by an injunction granted on his application; or it may be a statutory offence punishable by imprisonment, penalty, or fine in a court of summary jurisdiction (see Vol. IV., pp. 198–202).

A private individual cannot bring an action in respect of a public nuisance; unless it has caused him some special damage beyond that suffered by him in common with other members of the public affected

by it. Thus, it is a public nuisance to obstruct a highway ; and one who merely shares with other members of the public the inconvenience of not being able to use the highway in the ordinary manner, cannot maintain an action in respect of the obstruction. But a private person has a right of action for damages if the obstruction causes him special damage, such as by cutting off the means of access to his premises, by darkening and diminishing the amenity of his rooms, or by deterring his customers, or by injuring him physically whilst lawfully using the highway. Again, it is a public nuisance to allow premises or fences adjoining a highway to fall into a ruinous condition, or to dig a dangerous pit near the highway, so as to expose persons lawfully using the highway to risk of physical injury ; and an action will lie at the suit of any person who thereby meets with physical injury (*Fenna v. Clare & Co.* [1895] 1 Q. B. 199). A highway authority, whose duty it is to maintain the public roads under its jurisdiction in a proper and safe condition, may be indicted, but is not liable to be sued, merely for not repairing a dangerous highway ; it is liable, however, to an action for damage caused by the negligent manner in which it has performed its duty to repair. This rule is sometimes expressed by saying that a highway authority is not liable for mere *non-feasance*, but is liable for *misfeasance* (*Cowley v. Newmarket Local Board* [1892] A. C. 345). Thus it is liable for physical injury to a person who, in the dark, falls over a heap of stones improperly left unlighted on the highway during the work of repairs.

A *private nuisance* is some unauthorised act or omission which causes injury to land, or materially interferes with a person's ordinary physical enjoyment of land by causing injury to health or sensible personal discomfort, or with his exercise of rights



over the land of others. The principle on which private nuisances are actionable is an application of the wider principle expressed in the maxim : *sic utere tuo ut alienum non lædas*, which means that you must so use your own property that you do not interfere with the legal rights of others. The following are some examples of actionable nuisances : fumes from copper-smelting works which damage trees and shrubs on adjoining land ; the smell from horse stables ; the excessive ringing of church bells ; noise caused by merry-go-rounds ; obstruction due to crowds outside a theatre ; vibration caused by machinery ; overhanging branches or undergrowing roots of trees ; substantial interference with the enjoyment of a natural right such as the right of an owner of land against his neighbours to the support of his land unweighted by buildings, or of an acquired right such as a right of support for land with buildings upon it (*Dalton v. Angus* (1881) 6 App. Ca. 740), or a right to a certain amount of light. These are merely illustrations ; and it would be a mistake to regard the category of nuisances as capable of enumeration, or the amount of annoyance or inconvenience necessary to constitute an actionable nuisance as capable of definition. The annoyance must be considered relatively ; “ what may be called the uncertainty “ of the test may also be described as its elasticity ” (*per* the Earl of Halsbury, L.C., in *Colls v. Home and Colonial Stores Limited* [1904] A. C. at p. 185). “ A “ dweller in towns,” he continues, “ cannot expect “ to have as pure air, as free from smoke, smell, and “ noise as if he lived in the country and distant from “ other dwellings ; and yet an excess of smoke, smell, “ and noise may give a cause of action. but in each of “ such cases it becomes a question of degree, and the “ question is in each case whether it amounts to a “ nuisance which will give a right of action.”

*Ancient lights*.—"The right to light is, in truth," as Lord Lindley said in *Colls v. Home and Colonial Stores Limited* [1904] A. C. at p. 212, "no more than a right "to be protected against a particular form of nuisance." The so-called "right to light" is not a natural right conferred by the law upon every occupant of land or buildings; "light, like air, is the common property "of all, or, to speak more accurately, it is the common "right of all to enjoy it, but it is the exclusive property "of none"—*per* the Earl of Halsbury, L.C., in the same case. But a right to light is an easement capable of being acquired by the owner of land, which thereupon is called the 'dominant tenement,' over adjoining land, which thereupon is called the 'servient tenement'; and the modes of acquiring this easement are (1) a grant, and (2) prescription upon the lapse of twenty years (Prescription Act, 1832; and see Vol. II., pp. 216-217, 424-426, and [1904] A. C. at p. 205).

The further question arises: To how much light can such a right be acquired by prescription? The answer supplied by *Colls v. Home and Colonial Stores Limited*, *supra*, and *Jolly v. Kine* [1907] A. C. 1 is: "Not necessarily the continuance of the whole quantity "that has been enjoyed, but only of so much of it as "will suffice for the ordinary purposes of inhabitation "or business according to the ordinary notions of "mankind, having regard to the locality and surrounding." But there seems nothing to prevent, say, a photographer or an artist acquiring by express grant, and enjoying during the continuance of the grant, a right to an exceptional amount of light. There is no hard and fast rule that a right to light once acquired carries a right to 45 degrees of unobstructed light; but that rule has been pronounced to be "a "fair working rule." So the legend "Ancient Lights," which is often seen affixed to the wall of a building,

denotes a claim by or on behalf of the owner of that building that he has acquired, by prescription or otherwise, a right to a reasonable amount of light over adjoining land. No right can, however, be acquired by prescription to the free passage of air (*Webb v. Bird* (1862) 13 C. B. N. S. 841), nor to a prospect (*Aldred's Case* (1611) 9 Co. Rep. 57 b).

*Who may sue.*—(i) In the case of a public nuisance, a person suing must show that he has sustained some injury or inconvenience beyond that suffered by him in common with the other members of the community affected by it; it is not necessary for him to have any right of occupation or other interest in land except as a member of the public. (ii) But a private nuisance is essentially an interference with the enjoyment of land, and, accordingly, it is usually the occupier, whether owner or tenant, who sues or abates. “A person who has no interest in property, no right “of occupation in the proper sense of the term,” cannot sue for a private nuisance; so the wife of the manager of a company who was allowed to reside on the company's premises as part of his remuneration, was not allowed to recover damages for personal injury caused by a nuisance emanating from the defendant's adjoining premises and arising from vibration due to the working of their machinery (*Malone v. Laskey* [1907] 2 K. B. 141). The hypothetical case put by Sir Frederick Pollock (*Law of Torts*), of the owner or master of a ship in harbour being entitled to sue for a private nuisance emanating from the shore, does not seem to conflict with this view. (iii) A person entitled to the land the enjoyment of which is affected, in reversion or in remainder, can only sue in the case of permanent injury to the land, or things growing upon it, or buildings upon it.

*Defences.*—In considering what degree of inconvenience or annoyance will amount to a nuisance,

regard must be had to the character of the neighbourhood; though it would seem that this consideration is not entitled to much weight when the nuisance complained of amounts to damage to property or serious personal discomfort (*Polsue v. Rushmer* [1906] 1 Ch. 234; [1907] A. C. 121). The fact that the plaintiff came to the nuisance of which he complains is no defence (*St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642); nor is the carrying on of a noisy or offensive trade the less actionable because it is a reasonable or necessary occupation to carry on somewhere, and the place selected is convenient for the purpose.

It seems possible to acquire a prescriptive right to commit a private nuisance; but this defence will not avail against a new occupant of the premises adversely affected who so alters the premises or their use that the acts complained of become a nuisance for the first time (*Sturges v. Bridgman* (1879) 11 Ch. D. 852).

And it must be remembered that many an act causing annoyance or inconvenience to a neighbour is a justifiable exercise of the rights of ownership, causing damage, but not actionable, *damnum sine injuria* (*Mayor of Bradford v. Pickles* [1895] A. C. 587).

*Remedies.*—A person who is injured by a private nuisance, or, beyond other members of the public thereby affected, by a public nuisance, has three remedies, namely, abatement, action for damages, and an injunction. (i) To *abate* a nuisance is to remove it; and the law allows the person aggrieved by a nuisance to remove it, provided he can do so peaceably and without trespassing on the land of an innocent person, and provided also that he causes no more damage than is necessary for the purpose of its removal. Thus, a man may remove a gate which obstructs his



right of way, or lop off branches of his neighbour's trees if they overhang his land (*Lemmon v. Webb* [1895] A. C. 1. But the overhanging branches and any fruit that may be upon them belong to the neighbour both before and after severance; and if the person abating the nuisance appropriates them, he is liable for the tort of Conversion (*Mills v. Brooker* [1919] 1 K. B. 555). There is a similar right to cut the roots of a neighbour's tree which have spread underneath the boundary. But, before actually abating a nuisance, it is usually advisable, especially in the case of nuisances arising from an omission as opposed to an act of commission, to give notice to the person causing it of your intention to abate it; though no notice is necessary when, as in the case of overhanging branches or undergrowing roots, you can abate the nuisance without leaving your own premises. Even the demolition of an inhabited house, after reasonable notice, may be justified as the abatement of a nuisance, *e.g.*, in the obstruction of the rights of commoners (*Lane v. Capsey* [1891] 3 Ch. 411).

(ii) and (iii). The more prudent remedy, however, in most cases, is by action to recover damages for the injury sustained, and, if the nuisance is continuing or cannot be adequately compensated in damages, for an injunction to restrain the repetition of the acts causing it, or to compel the wrongdoer to remove it.

#### TORTS AFFECTING CHATTELS CORPOREAL.

Under this head we shall explain shortly the law relating to Trespass, Conversion, Detinue.

1. TRESPASS.—Trespass in respect of corporeal chattels (*trespass de bonis asportatis*) is substantially of the same character as trespass to land, which we have already discussed. It has been defined as the "direct infringement of the possession by another

“of corporeal personal chattels by means of an  
 “asportation (*i.e.*, carrying away) or other physical  
 “invasion.” Asportation is not essential; nor,  
 probably, is actual damage. Sir Frederick Pollock  
 (*Law of Torts*) says: “Authority, so far as known to  
 “the present writer, does not clearly show whether it  
 “is in strictness a trespass merely to lay hands on  
 “another’s chattel without either dispossession or  
 “actual damage. By the analogy of trespass to land  
 “it seems that it should be so. There is no doubt  
 “that the least actual damage would be enough.”

2. CONVERSION consists of any unauthorised dealing with the goods or chattels of another which amounts to a denial of the owner’s title to them, or is inconsistent with his right to the immediate possession of them. The innocent intention of the defendant in an action of Conversion is immaterial. Conversion, or, as it is also called, *Trover and Conversion* or simply *Trover*, was an action on the case which was invented in order to give a remedy to the possessor of goods in certain circumstances in which Trespass would not lie. A. had Trespass against B., the actual violator of his possession, but not against C., who received A.’s goods from B.; so A. was allowed to plead that he, A., had “casually lost the said goods and chattels out of his  
 “possession, and the same afterward came into the  
 “possession of C. *by finding*; yet C., well knowing  
 “the said goods and chattels to be the property of  
 “A. . . . hath hitherto wholly refused and still  
 “refuses (to deliver them up to A.) and afterward  
 “converted and disposed of the said goods and  
 “chattels to his (C.’s) own use.” This pleasant little story of casual loss and finding was a fiction, and was ‘non-traversable’; that is, C. was compelled by the courts to play the game, and was not allowed to ‘give the show away’ by proving that the goods were never

lost and found, but that, for instance, he bought them in good faith from a person whom he believed to be the owner. C. was compelled to ignore the fiction and plead to the gist of the claim against him, *i.e.*, the conversion. Thus, a person who in good faith obtains possession of goods belonging to another, from a person who is not able to give any title to them, and disposes of them for his own benefit or that of the apparent owner, is guilty of conversion, and liable to the true owner for the value of the goods (*Hollins v. Fowler* (1875) L. R. 7 H. L. 757). Again, if I instruct an auctioneer to sell my library, and he includes in the sale some books which you had lent to me, he is liable to you in damages for conversion when he sells and transfers possession of your books to a purchaser, although the auctioneer acts throughout without negligence, and in the full belief that all the books which he is selling are mine. But, in order to make him liable, it is essential that he should sell and deliver the goods with intent to pass the ownership; if he is a mere intermediary arranging a bargain between a seller and a purchaser, he is not liable for conversion (*Consolidated Co. v. Curtis* [1892] 1 Q. B. 495). It is hardly necessary to add, that an auctioneer who has to pay damages for conversion in the circumstances above described, would have a right of indemnity against me (*Adamson v. Jarvis* (1827) 4 Bing. 66).

It is far from easy to say what unauthorised acts in reference to goods will amount to conversion; such acts are usually 'acts of ownership,' *i.e.*, the kind of act which only an owner would be expected to do, for instance, using or consuming an article, or destroying it, or changing it into something different. What have been called 'merely ministerial dealings,' such as carrying or warehousing goods, are frequently held not to amount to conversion. It is usually

essential to an act of conversion that there should be in it some element of “denial of the right of the “plaintiff to the possession and enjoyment” of his goods. So where a ferryman removes my goods which I have placed in his boat, and deposits them in a safe place where I can get them, his act, “a simple “asportation of a chattel without any intention of “making any further use of it,” would not ordinarily amount to a conversion ; but if, while crossing a river, he threw them overboard so that they were lost, it would be (*Fouldes v. Willoughby* (1841) 8 M. & W. 540).

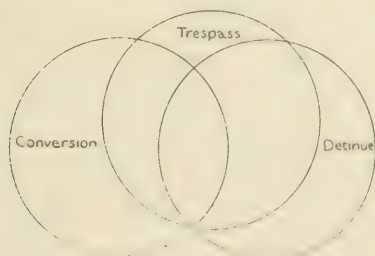
3. DETINUE is not itself a tort, but is the name of a very old form of action which lay for the wrongful *withholding* of chattels belonging to the plaintiff which (it is assumed) came, in the first instance, rightly (or at least not unlawfully) into the hands of the defendant. The action dates from a period before the line between actions on contract and actions in tort had been drawn in the modern sense of those terms (*Bryant v. Herbert* (1878) 3 C. P. D. 189 ; *id.* 389). In an action of Detinue, the judgment is for the recovery of the chattel itself, or its value ; and for damages for its detention. Formerly the defendant had the option of returning the chattel or paying its value ; and, if he chose the latter course, the chattel became his property. But since the passing of the Common Law Procedure Act, 1854, the Court has had power to order the defendant to restore the chattel without giving him the option of retaining it and paying damages instead (Rules of Supreme Court, Order XLVIII, rule 1) ; this order is enforceable by a writ of delivery followed if necessary by a writ of assistance (see p. 543). The action of Trover (see p. 362) in course of time became available in almost every case to which Detinue was applicable, and, being free from the



defence of 'wager of law' which characterised the actions of Debt and Detinue until 1833, practically superseded Detinue (see *Digest of English Civil Law*, § 828).

*Trespass, Conversion, and Detinue considered together—*

(i) *The difference in the wrongful act.*—The importance of the distinction between these three remedies has greatly diminished since the abolition of forms of action in the nineteenth century; but it has not entirely disappeared. Although it is no longer necessary for a plaintiff to state the particular form of his action, yet, unless he can prove facts which will entitle him to relief by means of some form of action known to the law, he will fail; and the precise nature of his action is relevant in considering the period of limitation applicable to it. Moreover, in the case of the three actions we are now considering, there are differences, as we shall see, in the nature of the remedy asked for, and in the measure of damages recoverable. Diagrammatically these three actions might be depicted as three intersecting circles; some wrongful acts would fall within the segment common to all three, others within one of those segments common to two circles, and others only within the segment of each circle lying outside both the other circles.



For instance, you take my horse from my stable without authority, and refuse on demand to restore it to me; Trespass and, according to the remedy I

want, Conversion or Detinue. You take my horse from my stable without authority and then sell it; Trespass and Conversion. You have bought my horse from some person who could not give you a good title to it, the sale not taking place in market overt (see pp. 112–114) or in such other circumstances as to remedy that defect, and you refuse on demand to restore it to me; Conversion or Detinue. You slash my horse's leg with a knife while I am riding upon it, and scratch or more seriously wound it; Trespass.

*Demand and refusal.*—The wrongful act which is the essence of Detinue is an unlawful refusal to deliver up on demand; in Conversion that is one of many wrongful acts for which that action will lie. In both cases, that is, Detinue and this particular kind of Conversion, the cause of action is not complete until there has been a demand followed by an unlawful refusal. “The authorities show clearly, as one would expect, that a man does not act unlawfully in refusing to deliver up property immediately on demand made. He is entitled to take adequate time to inquire into the rights of the claimant” (*per* Fletcher Moulton, L.J., in *Clayton v. Le Roy* [1911] 2 K. B. at p. 1051). “The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use” (*per* Bramwell, B., in *Burroughes v. Bayne* (1860) 5 H. & N., at p. 309). So in *Clayton v. Le Roy* [1911] 2 K. B. 1031 (an action of Detinue in which the fatal defect was treated by the Court as equally fatal to an action of Conversion on the facts of this case) the plaintiff's watch was stolen and bought, in circumstances assumed, for the purposes of the case, not to constitute a sale in market overt, and sent by the

purchaser to the defendant for an opinion as to whether it was a genuine antique watch. The defendant, recognising it as a watch which he had, some years previously, sold to the plaintiff, informed the recent purchaser, and, on learning from him his willingness to restore it to its original owner on payment of the price recently paid for it, wrote to the plaintiff stating how it came into his (the defendant's) possession, and communicating the recent purchaser's offer "to give it up for the price it cost him, if the "person from whom it was stolen wished to repurchase "the watch." The plaintiff treated this letter as equivalent to a wrongful conversion or refusal, and forthwith issued a writ. The managing clerk of the plaintiff's solicitor thereupon took the writ and, calling at the defendant's shop, demanded that the defendant should deliver up the watch to him. On the defendant's refusal, the writ, which had been issued some two hours previously, was promptly served upon him. In these circumstances, the Court of Appeal held that, at the time of the issue of the writ, there had been no unlawful refusal to deliver up or conversion to the defendant's use ; "whether "an action is one of Detinue or of Trover (*i.e.*, conversion), proof that the detention is wrongful, and "amounts to a conversion, forms the gist of the "action" (*per* Farwell, L.J., at p. 1052).

(ii) *The difference in the remedy sought.*—In Trespass and Conversion the remedy asked for is damages ; and there are circumstances in which an injunction would be appropriate. In Detinue the plaintiff seeks the restoration of the article detained and damages for its detention, and asks the Court to exercise the power conferred upon it by the Common Law Procedure Act, 1854 (Rules of Supreme Court, Order XLVIII., rule 1), of ordering the actual chattel to be delivered by the defendant to him. If the Court declines to

exercise this discretion in favour of a successful plaintiff, he must be content with a judgment for damages representing the value of the chattel; in either event he is entitled to damages (if any damage has resulted) for its detention. One result of the satisfaction of a judgment in Detinue, when it takes the form of paying damages representing the value of the goods, or in Conversion is, that satisfaction of the judgment automatically vests the property in the chattel in the defendant (*Brinsmead v. Harrison* (1871) L. R. 6 C. P. 584).

(iii) *The measure of damages* is, (a) in Trespass, the value of the article, if it is lost to the plaintiff, or the amount of his damage naturally and probably resulting, if it is merely injured; (b) in Conversion, it is usually the value of the article, excepting where the plaintiff's interest in it is a limited one and his loss consequently less than it would have been if he had been an unqualified owner. For instance, a buyer of goods not yet paid for, who is suing the unpaid seller for Conversion, will only recover the amount of the damage which he has sustained, that is, in general, the difference between the purchase price and the market price of the article at the time of the conversion (*Chinery v. Viall* (1860) 5 H. & N. 288); (c) in Detinue, it is the value of the article, with (it seems) the same exception as in the case of Conversion, together with damages (if any damage has resulted) for the detention. Vindictive or exemplary damages may be awarded in Trespass, but not in Conversion or Detinue.

(iv) *Who may sue*.—As a general rule, the plaintiff in an action of Trespass or of Conversion or of Detinue must be able to prove that he had, at the time of the tort complained of, either possession or the immediate right to possession of the subject-matter; and a master who entrusts his servant with the custody of goods



nevertheless retains the possession, the servant having merely custody or detention. The position is, however, different when a stranger entrusts a servant with goods for his master (see Embezzlement, Vol. IV., pp. 104–106). In the case of goods which are the subject of a bailment (Chap. IX.), (a) the bailor may bring Trespass or Conversion or Detinue against a wrongdoer; unless, and so long as, he has conferred upon the bailee (for instance, a pawnee or a hirer, but not a gratuitous borrower), an exclusive possession; and (b) the bailee, in virtue of his possession, may bring these actions against a wrongdoer, even Conversion, and even though he may not be responsible to his bailor (*The Winkfield* [1902] P. 42). He sues on the strength of his own possession. Thus it often happens that both a bailor and a bailee may be able to sue a wrongdoer for the same wrongful act, in which case the bailee, if responsible to his bailor, will receive the proceeds of his judgment on behalf of his bailor, or a proper proportion of them if both bailor and bailee have sustained damage; and the Court will see to it that the wrongdoer is not made to pay the amount of the damage done by him twice over (*The Winkfield, supra*; *The Zelo* (1921) 38 T. L. R. 69).

So also, even a finder has enough possession to enable him to bring these actions against any person except the rightful owner; and the well-known chimney-sweeper succeeded in *Trover* (*i.e.*, Conversion) against the jeweller who sought to fob him off with three halfpence in exchange for a valuable piece of jewellery found by him and handed to the jeweller for inspection (*Armorie v. Delamirie* (1722) 1 Str. 505; 1 Smith's Leading Cases). Possession usually involves (i) a certain physical relation to a chattel, *e.g.*, that it is in my hand or in my house, and (ii) a certain mental element or intention, *e.g.*, that I intend to exclude all or most other persons from the enjoyment

of it. Yet it is possible to have possession of a chattel without being aware of its existence. Thus, when a workman employed by a waterworks company, as owners and occupiers of land, to clean out a pool found two rings in the mud, it was held that the company was entitled to the rings as against the workman; for the company's intention to exercise control over the land comprised a similar intention with regard to the things which might be upon it or in it (*South Staffordshire Water Co. v. Sharman* [1896] 2 Q. B. 44). But the same rule does not apply to a bundle of bank notes dropped in a part of a shop to which the public have free access; for of these the shopkeeper has no custody or control, and so the finder is entitled to them as against the shopkeeper (*Bridges v. Hawkesworth* (1852) 21 L. J. Q. B. 75) (see also Vol. II., p. 508, and, as to the position of a finder in the criminal law, Vol. IV., pp. 92–93). The position of the finder when suing a wrongdoer as above described is an illustration of the general principle (subject to certain qualifications that need not be mentioned here) that a defendant in Trespass or Conversion or Detinue cannot set up *jus tertii*, i.e., cannot plead as a defence that the plaintiff is not the owner of the chattel, unless he goes further, and proves that he (the defendant) was acting upon the instructions of the owner in committing the *primâ facie* tortious act of which the plaintiff complains, in which case the defendant is probably defending the action on behalf of the owner and has received an indemnity from him. So the jeweller could not plead that A. B. and not the chimney-sweeper owned the jewel, unless he could also prove that he was acting upon A. B.'s instructions in detaining it; nor could a railway company in whose cloak-room I deposit a bicycle justify a refusal to restore it to me on the ground that it belongs to A. B., unless they are acting

upon A. B.'s instructions in doing so (*Jeffries v. Great Western Railway Co.* (1846) 5 E. & B. 802).

4. REPLEVIN.—The main feature of this action is that its institution is preceded by an application to the registrar of a county court to order the provisional return to the plaintiff of goods which, as he alleges, have been wrongfully taken from him by the defendant, upon security being given by the plaintiff that he will forthwith bring and prosecute an action of Replevin against the defendant, wherein the lawfulness of the taking will be decided. In origin this action is very old; but, in its modern form, it is practically confined to cases of alleged wrongful distress, and will be more appropriately considered in that connection (see pp. 425–426).

5. RECAPTION, *i.e.*, re-taking, by force if necessary, is a species of self-help which has survived to our day, and, though only to be resorted to with great care, must be regarded as an effective extra-judicial remedy for obtaining or recovering the possession of goods by an owner or other person who has a right to the possession of them. Thus in *Blades v. Higgs* (1861) 10 C. B. N. S. 713, the Marquis of Exeter's gamekeepers were able to "justify using the force "sufficient to defend their right (*i.e.*, their master's) "and retake" some rabbits of the Marquis in the possession of a game-dealer; although the rabbits, doubtless poached, had never been in the possession of the Marquis (so that there was no actual re-taking), and although the game-dealer might have come by them innocently. It seems also that a mere possessor who is not the owner, *e.g.*, a bailee, may take or re-take goods to the possession of which he is entitled, and use reasonable force in doing so.

As we have already seen (pp. 354–355), although forcible entry on land is a criminal offence, a reasonable

amount of force in removing from the land a wrongful possessor and his goods may be civilly justified by or on behalf of the owner of the land (*Hemmings v. Stoke Poges Golf Club Limited* [1920] 1 K. B. 720).

#### NOTE ON AUTHORITIES.

[For more detailed treatment of the subject of this chapter, the student should refer to Sir Frederick Pollock, "*Law of Torts*," or Sir John Salmond, "*Law of Torts*," or the "*Digest of English Civil Law*," pp. 380-426. Many of the cases referred to will be found in Professor Kenny's "*Cases on the Law of Tort*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Six Carpenters' Case* (1610) 8 Co. Rep. 146a ; 1 *Smith's Leading Cases*.

*Hurst v. Picture Theatres Limited* [1915] 1 K. B. 1.

*Harrison v. Duke of Rutland* [1893] 1 Q. B. 142.

*Hadwell v. Righton* [1907] 2 K. B. 345.

*Clinton v. J. Lyons & Co. Limited* [1912] 3 K. B. 198.

*Heath's Garage Limited v. Hodges* [1916] 2 K. B. 370.

*Thayer v. Purnell* [1918] 2 K. B. 333.

*Hemmings v. Stoke Poges Golf Club Limited* [1920] 1 K. B. 720.

*St. Helen's Smelting Co. v. Tipping* (1865) 11 H. L. C. 642.

*Dalton v. Angus* (1881) L. R. 6 App. Ca. 740.

*Colls v. Home and Colonial Stores Limited* [1904] A. C. 179.

*Hollins v. Fowler* (1875) L. R. 7 H. L. 757.

*Consolidated Co. v. Curtis* [1892] 1 Q. B. 495.

*Clayton v. Le Roy* [1911] 2 K. B. 1031.

*Armorie v. Delamirie* (1722) 1 Str. 505 ; 1 *Smith's Leading Cases*.

*South Staffordshire Water Co. v. Sharman* [1896] 2 Q. B. 44.

*The Winkfield* [1902] P. 42.

*Blades v. Higgs* (1861) 10 C. B. N. S. 713.]



## CHAPTER XXII.

## MISCELLANEOUS TORTS.

LASTLY, we have to speak of a miscellaneous group of injuries which may affect either the person or the reputation, or the property, of the person injured. Under this head we shall explain shortly the law relating to negligence, deceit, malicious prosecution, maintenance, procuring breach of contract, conspiracy, and seduction.

## 1. NEGLIGENCE.

It is proposed to sacrifice logic to convenience by grouping together under this title a number of illustrations of liability in tort, for most of which an action 'on the case,' usually founded on negligence, is the appropriate remedy. But it must be clearly understood, that negligence is not in itself a tort, but is an element—a ground of liability—in a large number of torts, many of which have definite names, *e.g.*, Trespass to the person (*Stanley v. Powell* [1891] 1 Q. B. 86) or Libel (*Vizetelly v. Mudie's Select Library* [1900] 2 Q. B. 170). The matter is put thus by Sir John Salmond in his *Law of Torts* (5th ed.), p. 21 : "negligence and "wrongful intent are the two alternative forms of "mens rea, one or other of which is commonly required "by law as a condition of liability"; and the point is fully discussed in a note on pp. 545–546, in the *Digest of English Civil Law*.

With this preliminary warning, we may define negligence as a failure by the defendant to exercise towards the plaintiff that degree of care or skill which

*it was his legal duty to exercise in the circumstances of the case.* To ground an action on this breach of duty, three elements must be present: (i) a legal duty towards the plaintiff to use care or skill, (ii) a breach of such duty, and (iii) damage caused by the breach as the natural and probable result of it.

The duty must be a legal one. Thus, there may be a moral duty, a neighbourly duty, to farm your land properly and keep it clean; but, if you allow it to become overrun with thistles which are blown by the wind in large quantities on to your neighbour's land and cause damage to him, you are not liable to him, because you are under no legal duty to take care (*Giles v. Walker* (1890) 24 Q. B. D. 656).

Again, there must not only be a legal duty which is neglected but a legal duty owed to the plaintiff. Thus a carriage repairer is not liable for injury sustained by the driver, a stranger to the contract, when a wheel comes off owing to negligence in effecting the repairs; because he is not under any legal duty to the driver to execute the repairs properly (*Earl v. Lubbock* [1905] 1 K. B. 253). And, for the same reason, a surveyor is not liable to a stranger who has acted, to his loss, by advancing money on the faith of a certificate honestly but carelessly granted by the surveyor to his employer, and shown by the employer to the stranger for the purpose of obtaining the advance (*Le Lièvre v. Gould* [1893] 1 Q. B. 491). So also, a landlord is not liable to his tenant's wife who injures herself by falling through the kitchen floor (of the condition of which she had already complained to him), even when he has contracted with the tenant to repair the floor; for the wife is a stranger to the contract (*Cavalier v. Pope* [1906] A. C. 428), where an earlier statement of the law by Erle, C.J., was quoted with approval. "A landlord who lets a house in "a dangerous state is not liable to the tenant's

“customers or guests for accidents happening during the term ; for, fraud apart, there is no law against letting a tumble-down house ; and the tenant’s remedy is upon his contract, if any.”

But this statement of the law must be understood in the light of the following two considerations :

(a) The Housing Acts (see ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909) have, in the case of the dwelling-houses within certain limits of rent, imported into the contract of tenancy a purely contractual obligation *towards the tenant alone*, that the premises shall be at the beginning of and throughout the tenancy reasonably fit for human habitation (*Ryall v. Kidwell* [1914] 3 K. B. 135) ; and (b) there is an important group of cases, mostly concerning flats and tenements, city offices, and similar buildings, where the landlord retains possession or control of some part of the premises such as staircases, steps, railings, etc., the use of which is common to all the tenants and their wives and children and guests and customers. In these cases, the landlord is frequently held liable for injuries resulting from the defective condition of these parts of the premises as an invitor of the persons using the premises ; nor does the existence of an express or implied obligation upon the landlord to keep such parts of the premises seem to be entirely irrelevant in the case of strangers (*Miller v. Hancock* [1893] 2 Q. B. 177 ; *Huggett v. Miers* [1908] 2 K. B. 278).

Two questions must now be faced. (i) What are the sets of circumstances in which one person is under a legal duty to exercise care towards another ? (ii) What is the degree of care or skill required ? The first of these questions is sometimes answered by saying, very generally, that the law casts upon every person the duty of exercising care or skill where the failure to do so would be likely, in the ordinary course

of events, to cause damage to the person or property of another; but it is believed to be safer to direct attention to a number of well-known relationships in which the courts have found this legal duty to exist, for instance, the common use of a highway, the lawful use of another's premises. At any rate, this is the method we shall adopt. The answer to the second question is, that the degree of care or skill required is, in the vast majority of cases, that which 'the average prudent man' would be expected to show, to wit, an ordinary, reasonable, amount of care or skill, and not that degree which would be expected of this particular defendant with all his idiosyncrasies and his peculiar faculties, supernormal or subnormal (*Vaughan v. Menlove* (1837) 3 Bing. N. C. 468). That is the usual test; but, as we have already seen in the case of the duty of a bailee (pp. 161-162), and as we shall now see in other cases, the amount of care or skill required may vary with the circumstances.

No exhaustive list of the sets of circumstances giving rise to a duty to exercise care or skill is possible or desirable; but we shall now proceed to mention a few of them.

*Use of the highway.*—Every person using a highway on land or water is under a duty to take reasonable care to avoid doing injury to other persons lawfully on the highway.

*Bailments.*—A bailee in possession of the goods of another for any purpose is under a duty, independently of contract, to take care of them, the degree of care varying with the nature and purpose of the bailment (pp. 161-162). The liability of carriers of goods and of passengers has already been referred to (pp. 177-184), and it must be noted that this liability arises independently of contract. Thus, where a servant took a ticket and travelled on a railway having with him in a box his livery, which belonged to his mistress,



she could recover from the railway company for the damage caused to the livery by the negligence of the company's servants (*Meux v. Great Eastern Railway Company* [1895] 2 Q. B. 387). And a child aged three years and two months, travelling with his mother on a railway as a passenger, but without a ticket, was allowed to recover damages for the negligence of the company's servants (*Austin v. Great Western Railway Co.* (1867) L. R. 2 Q. B. 442); but not a child injured in similar circumstances while *en ventre sa mère*. (It is perhaps unnecessary to repeat that the carriage of a passenger is not a bailment.)

*Occupation of land.*—The occupier of land is under a certain duty towards persons resorting to his premises; but the nature of the duty varies according to the character in which the persons come upon his premises. Such persons may be classified for this purpose in four grades: (i) those having a contractual right to be there; (ii) invitees, *i.e.*, persons there on lawful business; (iii) licensees, for instance, social guests and visitors; and (iv) trespassers.

(i) The rights of members of the first class (which, it will be noticed, rest on contract rather than on tort) have recently been defined by McCardie, J., as follows: "Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. The rule is subject to the limitation, that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises. . . . But, subject to this

“limitation, it matters not whether the lack of  
 “care or skill be that of the defendant or his  
 “servants, or that of an independent contractor or  
 “his servants, or whether the negligence takes place  
 “before or after the occupation by the defendant of  
 “the premises (*Maclean v. Segar* [1917] 2 K. B.  
 at p. 322 ; see also *Francis v. Cockerell* (1870) L. R.  
 5 Q. B. 501). And this rule “applies alike to  
 “premises and to vehicles. It matters not whether  
 “the subject be a race-stand, a theatre, or an inn ;  
 “whether it be a taxi-cab, an omnibus, or a railway  
 “carriage.”

(ii) In the second case, “the duty of the invitor  
 “towards the invitee is to use reasonable care to  
 “prevent damage from unusual danger of which he  
 “knows or ought to know. If the danger is not  
 “such that he ought to know of it, his liability does  
 “not extend to it” (*per Buckley, L.J., in Norman v. Great Western Railway Co.* [1915] 1 K. B. at p. 592).  
 Instances of invitees are a customer in a shop, another  
 person’s workman sent to the premises to do repairs  
 there or for some other business (*Indermaur v. Dames*  
 (1866) L. R. 1 C. P. 274 ; 2 C. P. 311), a van-driver  
 sent to a railway station to receive or deliver goods  
 (*Norman v. Great Western Railway Co.* [1915] 1 K. B. 584).

(iii) A mere licensee or a guest at a private house  
 (but not a guest at an inn, who belongs to the first  
 class mentioned above) occupies a weaker position ;  
 for the duty owed by the occupier of premises to him  
 is, merely, not to “set a trap,” which means that  
 the occupier must warn him of any concealed or  
 unexpected danger upon the premises which is known  
 to the occupier. The distinction between this class  
 and the next one is not easy to draw ; for instance,  
 in *Lowery v. Walker* [1911] A. C. 10, the defendant,  
 the owner of a horse known to him to be savage, was  
 held liable to the plaintiff, who was attacked and

injured by the horse while crossing the field by a track which had been used by the public for many years, not in pursuance of any right of way or express licence from the defendant, but without his interference and with his acquiescence. The plaintiff may have been a 'trespasser' in one sense of the word, but not in the sense in which it is used in the following paragraph. And, as we have already seen (pp. 288-289), the law takes notice of the mischievous propensities of children, and is apt to treat an injured child suing for redress with more lenience than is received by the adult, especially when there is any allurement into the trespass or mischief (*Cooke v. Midland Great Western Railway of Ireland* [1909] A. C. 229).

(iv) A trespasser cannot expect to receive much consideration. He cannot complain of negligence, but he is not *caput lupinum*. He is entitled to recover damages for any injury intentionally inflicted upon him by the occupier of the premises, for instance, by means of a spring-gun (*Bird v. Holbrook* (1828) 4 Bing. 628); but he has no remedy for injury unintentionally inflicted. (By the Offences against the Person Act, 1861, s. 31, it is a misdemeanor to set or place any spring-gun or other engine calculated and intended to destroy human life or inflict grievous bodily harm upon a trespasser or other person, except in a dwelling-house between sunset and sunrise.)

*Spondes peritiam artis*.—A person carrying on a profession or trade owes to those with whom he deals, independently of contract, a duty to exercise that degree of skill which is usually shown by persons of his profession or trade. Thus, a surgeon whom I engage to operate upon my wife or child, owes a duty to my wife or child, quite apart from the duty owed to me, to operate skilfully.

*Master and servant*.—We have already discussed the liability of the master to his servant for injuries

sustained by the latter in the course of his employment (pp. 298–308). A number of statutes have so altered and enlarged the master's earlier liability, that it is necessary to remind the reader that at Common Law the master's liability is based upon negligence, of which common illustrations are a failure to provide reasonably safe appliances or to exercise reasonable care in the selection of competent fellow-servants or the giving of improper orders.

*Delivery of dangerous things.*—A person who delivers to another, on sale or on hire or for carriage or some other purpose, an article which the former knows, or ought to know, is likely to cause injury unless special precautions are taken, is under a duty to use reasonable care to prevent that injury, by warning persons likely to use or handle it of the danger. Instances of this principle will be found in the case of loaded fire-arms (*Dixon v. Bell* (1816) 5 M. & S. 198) and dangerous chemicals which are sold (*Clarke v. Army and Navy Co-operative Society* [1903] 1 K. B. 155) or delivered to a lighterman for transit (*Bamfield v. Goole Transport Co.* [1910] 2 K. B. 94), and in the case of a vicious horse let out on hire (*White v. Steadman* [1913] 3 K. B. 340). And it will be noticed, that an important aspect of the principle now under discussion is, that it frequently enables an injured person to recover damages who is a stranger to the transaction under which the defendant parted with the noxious article, and who therefore would probably have failed, but for this rule, to recover damages from him, because there was no 'privity' or communication between them (*Blacker v. Lake & Elliot* (1912) 106 L. T. 533). Cases of fraud, such as *Langridge v. Levy* (1837) 2 M. & W. 519, belong to a different category (see pp. 392–394).

*Non-natural accumulation of dangerous substances.*—A person who stores or accumulates upon land in his



occupation a substance which, although not intrinsically dangerous, is likely to cause damage to the person or property of another, if it should escape, is liable to that other for all the natural and probable consequences of its escape, even if he has been guilty of no negligence. If an element of culpability in the defendant is sought for, it must be found in the fact of the original accumulation; for it is not necessary to prove any lack of care conducing to the escape. This important ground of liability is commonly known as "the rule in *Rylands v. Fletcher*" (1868) L. R. 3 H. L. 330, where the defendants, owners of a reservoir, were held liable, "however skilfully and "carefully the accumulation was made," for the damage done to the plaintiffs' subjacent coal mine, which was flooded by the water penetrating a vertical shaft and finding its way into the mine. Among the substances to which this principle of extraordinary responsibility has been applied may be mentioned sewage, yew trees projecting over a boundary and eaten by a horse with fatal results, and a tramway company's electricity escaping and disturbing the regularity of a telegraph company's electric current. But liability for collections of animals seems to rest on different principles (see *Stearn v. Prentice* [1919] 1 K. B. 394).

The rule in *Rylands v. Fletcher* is often referred to as imposing an 'absolute duty.' This is correct in the sense that the degree of care and skill exercised in making the accumulation, and in preventing the escape of the substance accumulated, is not in question. But it must not be understood to mean that the duty is entirely without qualification. For the person responsible for the accumulation can excuse himself by showing that the escape of the substance was due (i) to some supervening *vis major* such as the act of God, for instance, an earthquake or an extraordinary fall of rain "so great that it could not reasonably

“ have been anticipated,” causing a reservoir to overflow (*Nicols v. Marsland* (1876) L. R. 2 Ex. D. 1); (ii) (probably) to the wrongful act of a third party over whom the defendant has no control (*Box v. Jubb* (1879) L. R. 4 Ex. D. 76), though the question of the likelihood of such an act would seem to be a pertinent consideration (*McDowall v. Great Western Railway Co.* [1902] 1 K. B. 618; [1913] 2 K. B. 331); (iii) to the act of the King’s enemies; (iv) to the act of the plaintiff himself.

Moreover, if the accumulation was made (v) for the benefit of plaintiff, or for the common benefit of both plaintiff and defendant, as for instance a cistern of water at the top of a flat or business offices maintained by the landlord for the benefit of himself and all his tenants (*Carstairs v. Taylor* (1871) L. R. 6 Ex. 217), or (vi) in pursuance of some statutory authority or common law obligation (*Madras Railway Co.’s Case* (1874) L. R. 1 Ind. App. 364), then the person responsible for the accumulation will not be liable at all, in the absence of negligence.

*Common misfortune.*—It is necessary to distinguish from the *Rylands v. Fletcher* type of case, those cases in which two or more persons are threatened with a common disaster, and one of them succeeds in protecting himself at the expense of his neighbour. The principle of these latter cases, put shortly, is, that you have a right to defend yourself against the common misfortune before it has occurred to you, but, once it has arrived upon your land, you cannot with impunity transfer it to your neighbour. So where, owing to an extraordinary and unprecedented storm, a large quantity of rain-water was dammed up against a railway embankment and endangering it, the railway company was held liable to a farmer in occupation of adjoining land on a lower level upon which the flood poured through holes pierced in the embankment by

the railway company in order to save it (*Whalley v. Lancashire and Yorkshire Railway Co.* (1884) 13 Q. B. D. 131). But a farmer is entitled to stand on the boundary of his own land (or in front of it if he can do so without trespassing) and keep off a swarm of locusts, even though the effect of his defensive measures may be to divert the common enemy to his neighbour's farm (*Greyvenstein v. Hattingh* [1911] A. C. 355).

*Fire.*—The principles governing liability for damage done by fire are not clear, but the following summary is believed to be substantially correct.

(i) A householder or occupier of any building or land is not liable, in the absence of the negligence of himself or of other persons for whom he is responsible, for the consequences of any fire which “shall . . . “accidentally begin” upon his premises (which means “begin without negligence for which he is responsible”), unless it emanates from some dangerous machine (Fires Prevention (Metropolis) Act, 1774, a statute which is of general application; *Filliter v. Phippard* (1847) 11 Q. B. 347). When a fire may be said to ‘begin,’ is far from clear.

(ii) But, according to the stricter though not universally accepted view, the householder is liable, negligence or no negligence, for the consequences of the escape of a fire which is intentionally kindled on his premises by him or by his authority express or implied, even when it is kindled for an ordinary domestic purpose. It is kindled at his peril.

(iii) A person who uses fire for a non-domestic purpose, for instance, in a traction engine which emits sparks that set light to a hay-rick (*Powell v. Fall* (1880) 5 Q. B. D. 597), or in a motor-car in the carburettor of which the petrol catches fire (*Musgrove v. Pandelis* [1919] 2 K. B. 43), is liable, negligence or no negligence, for the consequences of such fire. Such machines are potentially dangerous things in

themselves ; and a man uses them at his peril so far as concerns the escape of fire.

(iv) Railway companies and other bodies and persons who are expressly authorised by statute to use locomotive engines, or fire in some other form, are not liable, in the absence of negligence, for damage caused, *e.g.*, by sparks and cinders (*Vaughan v. Taff Vale Railway Co.* (1860) 5 H. & N. 679) ; except that, by the Railway Fires Act, 1905, in the case of any claim not exceeding £100 for damage done to agricultural land and crops, the defence that the engine was used under statutory powers does not protect the railway company.

*Contributory negligence.*—The plaintiff is not entitled to recover any damages if he was himself guilty of ‘contributory negligence’ ; that is to say, where, notwithstanding the defendant’s negligence, he could, by taking reasonable care, have avoided the damage. “Although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant’s negligence, he is entitled to recover ; if by ordinary care he might have avoided them, he is the author of his own wrong ” (*Butterfield v. Forrester* (1809) 11 East, 60). Thus, if the plaintiff was knocked down and injured by the defendant’s van, whilst it was being driven on the wrong side of the road, but it is proved at the trial that, although the van was where it ought not to have been, the plaintiff could, by taking ordinary care, have kept out of its way, he will fail in the action, and probably have to pay the costs of it.

‘Contributory negligence’ is an unfortunate expression ; for it does not suffice for a defendant to prove that the plaintiff also was negligent, and so contributed to the occasion of the damage. It is necessary that he should go further and show that



the plaintiff's negligence was the decisive, effective, immediate, cause of the damage (*Radley v. London and North Western Railway Co.* (1876) L. R. 1 App. Ca. 754). So, in an action brought against a pilot, in a common law court, by the owner of a barge which was run down by a steamer in charge of the defendant, the plaintiff's servants were found to have been negligent in failing to keep a look-out ; but, since that was not the proximate cause of the collision, and the defendant himself was negligent, the defence of 'contributory negligence' did not avail, and the plaintiff succeeded (*Tuff v. Warman* (1857) 2 C. B. N. S. 740).

As we have already seen (pp. 288–289), when the plaintiff is a child of tender years, the defence of 'contributory negligence' receives a more indulgent interpretation in favour of the plaintiff than when the plaintiff is an adult (*Lynch v. Nurdin* (1841) 1 Q. B. 29 ; *Harrold v. Watney* [1898] 2 Q. B. 320). But it seems that a child in charge of an adult is in law affected by the negligence of its custodian, and that, if that negligence should prove to be the decisive cause of injury to the child, then, notwithstanding the defendant's negligence, the child may be unable to recover damages (*Waite v. North Eastern Railway Co.* (1858) E. B. & E. 719). Although this case can be supported on other grounds, there seems to be no reason why the principle of the identification of a child with its custodian should necessarily be involved in the explosion of the old heresy of the identification of the passenger with the driver of the vehicle conveying him, which took place in *Mills v. Armstrong* (1888) L. R. 13 App. Ca. 1).

*The defence of accident.*—We have already discussed (pp. 282–283) the defence of 'accident' or 'inevitable accident,' which is sometimes raised in an action founded on negligence (*Stanley v. Powell* [1891] 1 Q. B. 86).

*The damage.*—Negligence without damage does not give rise to an action based on the negligence; damage is the ‘gist of the action.’ And the damage must be the natural and probable result of the defendant’s failure to exercise the degree of care or skill required of him, or, if not the natural and probable result, then the result foreseen, by the defendant. It not infrequently happens, that the act of a third party intervenes between the defendant’s negligent act or omission or other wrongful act, and the occurrence of the damage; in such cases, if the third party’s act (which may in itself be negligent or otherwise wrongful) is one which is likely to happen, or which the defendant might reasonably anticipate as likely to happen, the defendant is liable in respect of it, if his negligence is the effective cause of the damage. Thus, a person who places across a road a spiked railing which is likely to be, and is in fact, removed by a third party and placed across the footway, is liable for injury caused by it (*Clark v. Chambers* (1878) 3 Q. B. D. 327); and a railway company whose servants are aware of the risk of mischievous boys trespassing on its sidings and interfering with its trucks, is liable for damage naturally caused by runaway trucks which, but for the boys’ interference, would not have broken loose, and could have been made secure against that interference (*McDowall v. Great Western Railway Co.* [1903] 2 K. B. 331).

The distinction between loss which is the direct result of the negligent act or omission, and loss which is too remote, is of great practical importance in assessing the damages recoverable by the plaintiff. The general principle is, that damages are recoverable to compensate the plaintiff for such loss or injury suffered as may have directly resulted from the defendant’s negligence (*Polemis v. Furness, Withy & Co.* [1921] 3 K. B. 560). Warrington, L.J., said, in

that case (p. 574):—"The presence or absence of "reasonable anticipation of damage determines the "legal quality of the act as negligent or innocent. "If it be thus determined to be negligent, then the "question whether particular damages are recoverable "depends only on the answer to the question, whether "they were the direct result of the act." Other damage is said to be 'too remote,' and therefore is not recoverable; even although it would not have happened but for the defendant's negligence. The negligence complained of must be the effective cause, and not merely one of several contributing causes, of the damage.

With the various statutory enactments limiting in certain cases the damages recoverable for negligence and other wrongful acts, for instance, the Railway and Canal Traffic Act, 1854, s. 7 (p. 180), the Innkeeper's Liability Act, 1863, s. 1 (p. 173), and the Merchant Shipping Act, 1894, s. 503 (pp. 181-184), we need not concern ourselves here.

*The burden of proof.*—Normally, the burden of proving that the damage complained of was caused by the negligence of the defendant is upon the plaintiff; "and if in the absence of direct proof, the circumstances which are established are equally consistent "with the allegation of the plaintiff as with the denial of "the defendants, the plaintiff fails"—as, for instance, when nothing more is established than that the body of the plaintiff's deceased husband was found mutilated near a level crossing over the defendants' railway (*Wakelin v. London and South Western Railway Co.* (1886) L. R. 12 App. Ca. 41).

When an action for negligence is tried with a jury, it is a question of law for the judge to decide whether any evidence has been given from which negligence causing the damage could be reasonably inferred; and, if there is such evidence, it is a question of fact for the jury to decide whether negligence ought in

fact to be inferred. If there is no such evidence, or if the evidence is equally consistent with the existence or non-existence of negligence, the judge will usually be justified in not allowing the case to go to the jury (*Metropolitan Railway Co. v. Jackson* (1877) L. R. 3 App. Ca. 193).

But there are certain circumstances when it is said : *res ipsa loquitur* ; the facts speak for themselves, and raise a presumption of negligence which it is for the defendant to rebut. In such a case, the burden of proof shifts to the defendant. Thus, if a barrel rolls out from an upper floor of your warehouse on to my head, “the fact of its falling is *prima facie* evidence “of negligence,” because barrels, when carefully handled, do not habitually behave in this manner. And so it is for you to rebut that presumption (*Byrne v. Boadle* (1863) 2 H. & C. 722). And the same presumption usually arises in the case of a collision between two trains owned and run by the same company (*Skinner v. London, Brighton and South Coast Railway Co.* (1850) 5 Ex. 787).

## 2. DECEIT.

The tort of deceit or fraud is committed *when a person has made, orally or in writing or even by conduct, a false representation of fact “knowingly or “without belief in its truth, or recklessly, careless whether “it be true or false,” with the intention that it should be acted upon by the plaintiff, and the plaintiff has acted upon it, thereby incurring loss.*

A few words must be said about each of the elements in this definition.

(i) *The false representation.*—Most fraudulent statements giving rise to actions of deceit are pure statements of fact ; but if I induce you to act to your detriment, for instance, to lend money to me or to



subscribe for shares in my company, by asserting falsely that I intend to do something which I have no intention of doing, then I make a false representation of fact as to my intentions. “There must be a “misstatement of an existing fact; but the state “of a man’s mind is as much a fact as the state of “his digestion” (*per* Bowen, L.J., in *Edgington v. Fitzmaurice* (1885) 29 Ch. D. at p. 483). There is one case in which the false statement, to be actionable in damages, must be in writing; for the Statute of Frauds Amendment Act, 1828, provides that no action shall be brought “to charge any person “upon or by reason of any representation or assurance “made or given concerning or relating to the “character, conduct, credit, ability, trade or dealings “of any other person, to the intent or purpose that “such other person may obtain credit, money, or “goods” thereupon, unless it is in writing and signed by the party to be charged therewith. The false statement must usually be an active misstatement of fact (*allegatio falsi*), or a false insinuation of a fact (*suggestio falsi*), and not merely *suppressio veri* (though, as we have already seen (pp. 64–65), the latter is relevant in a few special classes of contract); but occasionally an action will lie for “such a partial and “fragmentary statement of fact, as that the with- “holding of that which is not stated makes that “which is stated absolutely false” (*Peek v. Gurney* (1873) L. R. 6 H. L. at p. 403).

(ii) *The defendant’s state of mind.*—“In order to “sustain an action of deceit, there must be proof “of fraud, and nothing short of that will suffice; “and making a false statement through want of care “falls far short of, and is a different thing from, “fraud; and the same may be said of a false repre- “sentation honestly believed though on insufficient “grounds” (*per* Lord Herschell, in *Derry v. Peek*

(1889) L. R. 14 App. Ca. at pp. 374, 375). In this famous case, the House of Lords disentangled the tort of Deceit from certain doctrines which were tending to assimilate it to misrepresentation as a ground for equitable relief, and laid it down plainly that, before a man can be held liable for damages for fraud, you must prove that he was fraudulent. The effect of fraud in making a contract either void (if it involves a fundamental operative mistake) or voidable has already been discussed (pp. 59-65); and the action on the tort must be clearly distinguished from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. In *Derry v. Peek*, the directors of a tramway company issued a prospectus which contained the statement that "one great feature of this undertaking . . . is that by the special Act of Parliament obtained the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." As a matter of fact, this statement was inaccurate, and untrue; for it was necessary, in order that mechanical motive power might be used, for the Board of Trade to consent, and, when subsequently that consent was asked for, it was refused. But the judge found as a fact that the directors honestly believed that their assertion, "though . . . inaccurate and not altogether free from imputation of carelessness," was true; and accordingly the shareholder's action against them for damages for deceit failed. Lord Herschell stated that a false representation, to be actionable in damages, must have been made (1) "knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false" (adding that (3) is merely an instance of (2), and that "to prevent

“a false statement being fraudulent, there must . . . “always be an honest belief in its truth”). These authoritative statements of the law have, since 1889, furnished the test of the sufficiency of an untrue representation to found the action for damages on the tort of Deceit. That they have not narrowed the scope of the Courts of Equity in giving other remedies within their former exclusive jurisdiction with which the term ‘fraud’ has been associated, is apparent from the case of *Nocton v. Ashburton* [1915] A. C. 932.

Another point must be mentioned. It may seem paradoxical to say that a man can be fraudulent without being corrupt; and yet such is the result of the cases. In *Polhill v. Walter* (1832) 3 B. & Ad. 114 a defendant had to pay damages for deceit who allowed himself, in the supposed interests of an absent friend, to be persuaded into accepting a bill of exchange *per procuracionem* of that friend, when he knew that he had not his friend’s authority to do so. He thus falsely, but not corruptly, represented himself to have such authority; but the Court assented to the plaintiff’s contention, that “it is not necessary to “prove that the false representation was made from “a corrupt motive of gain to the defendant, or a “wicked motive of injury to the plaintiff”—a doctrine which was noticed by Lord Herschell in *Derry v. Peek* without disapproval. And in *Smith v. Chadwick* (1884) L. R. 9 App. Ca. at p. 201, the great authority of Lord Blackburn is to the same effect: “the motive of the person saying that which “he knows not to be true to another, with the intention “to lead him to act on the faith of the statement, is “immaterial. The defendants might honestly believe “that the shares were a capital investment, and “that they were doing the plaintiff a kindness “by tricking him into buying them.” The solution then of our seeming paradox appears to lie in the

difference between the immediate intention, which, to be actionable, must be fraudulent, and the ulterior motive, which need not be corrupt or improper: although few would covet the task of justifying in a forum of ethics the perpetration of an active fraud in order to do the victim 'a good turn.'

It was at once realised that the decision of the House of Lords in *Derry v. Peek* did not give sufficient protection to the investing public; and, accordingly, in the following year, by the Directors Liability Act, 1890, repealed by but re-enacted in s. 84 of the Companies (Consolidation) Act, 1908, it was provided, amongst other matters, that every promoter or director of a company who issues a prospectus inviting persons to subscribe for shares or debentures, is liable to pay compensation, to any person who subscribes for them on the faith of the prospectus, for loss sustained by any untrue statement therein; unless it is proved that such promoter or director had reasonable ground for believing, and did in fact believe, that the statement was true. Provision was also made for the recovery, in certain circumstances already referred to (p. 279), by a director or promoter not himself guilty of fraud, but who is made to pay compensation under this enactment, of a proportionate contribution from his colleagues.

(iii) *The intention to induce the plaintiff.*—We have seen how, in an action founded on negligence, there must usually be, except in the case of the extraordinary responsibility imposed by the law in such circumstances as the putting into circulation of things intrinsically dangerous, a certain privity between the plaintiff and the defendant, in order to establish the duty a breach of which, causing damage, forms the basis of the action. Here too, although the 'effective range' of a fraudulent statement is, as we shall see, greater than that of a negligent act or omission, a certain



connection between the parties must be made out; and the victim of the fraud must be within the scope of the fraudulent statement. It is not necessary that the fraudulent statement should be actually made to, or within hearing of, the victim; it is sufficient to prove that the statement was intended to be, or was reasonably likely to be, communicated to the victim and to influence him. A man goes into a shop to buy a gun, for the use, as he says, of himself and his sons. The gunsmith induces him, by a false and fraudulent representation as to its quality, to buy a particular gun, which bursts and injures one of the sons. The injured son can recover damages from the gunsmith for deceit (*Langridge v. Levy* (1837) 2 M. & W. 519). It is believed that, had the gunsmith been merely negligent, the son could not have recovered (*Earl v. Lubbock* [1905] 1 K. B. 253). Again, the normal object of issuing a prospectus is to induce investors to subscribe for shares; and a person who, having read and been impressed by a prospectus, subsequently buys shares in the market and suffers loss owing to the falsity of a statement in the prospectus which was fraudulently asserted to be true, is unable to recover damages for deceit from the directors; because he is not within the aim or scope of the prospectus (*Peek v. Gurney* (1873) L. R. 6 H. L. 377). But the result is different when it can be shown that a fraudulent prospectus has been scattered broadcast, not solely, or even primarily, with a view of inducing the public to apply for shares, but with the wider desire to improve the market in the company's shares.

(iv) *The plaintiff's conduct*.—The plaintiff must also prove that the fraudulent statement influenced him, *i.e.*, that he was 'taken in' by it, and that it was either the sole cause of his acting or materially contributed to his so acting, in such a way as to cause

him loss, by producing in his mind an erroneous belief which influenced his conduct (*Smith v. Chadwick* (1884) L. R. 9 App. Ca. 187). The fact that he could have verified the fraudulent statement, and would then have discovered its falsity, does not disentitle him to damages; if in fact he was content to act upon it, and did so act to his detriment.

(v) The plaintiff must also prove that he suffered loss as the natural and probable consequence of acting upon the defendant's fraudulent statement.

In conclusion, it may be said that, although the majority of actionable frauds are perpetrated in order to induce persons to enter into contracts, the action of Deceit has (at any rate since *Pasley v. Freeman* (1789) 3 T. R. 51) had no necessary connection with contract, a fact which is well illustrated by a case already referred to (p. 332) (*Wilkinson v. Downton* [1897] 2 Q. B. 57).

### 3. MALICIOUS PROSECUTION.

In order to succeed in an action for this tort, the plaintiff must be able to prove that the defendant maliciously, and without reasonable or probable cause, instituted criminal proceedings against him, which terminated in the plaintiff's favour. The burden of proving all these facts, including malice and the absence of reasonable and probable cause, lies on the plaintiff.

(i) *Malice* here means, that the defendant, in instituting proceedings, was actuated by spite, or by some other motive than that of furthering the ends of justice (*Brown v. Hawkes* [1891] 2 Q. B. 718). It is for the jury to find whether there was malice or not; and they may (but need not) infer it from absence of reasonable and probable cause.

(ii) *Reasonable and probable cause* was defined by Hawkins, J., in *Hicks v. Faulkner* (1878) 8 Q. B. D. at p. 171, as follows: “an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.” A very common test of the existence of such an honest belief, and a question frequently and properly put to the jury, is whether the defendant took reasonable care to inform himself of the true facts before instituting the proceedings complained of; but such a question ought not to be left to the jury, unless there is some evidence that the defendant failed to make proper enquiries, nor should the question of the defendant’s honest belief in the charge be left to the jury, unless there is some evidence of the absence of such belief (*Bradshaw v. Waterlow* [1915] 3 K. B. 527).

The action is usually tried with a jury, who determine whether the defendant acted maliciously or not, and find the facts on which the question of reasonable and probable cause depends. It is then for the judge to decide, whether the facts so found amount to reasonable and probable cause (*Abrath v. North Eastern Railway Co.* (1883) 11 Q. B. D. 440; (1886) 11 App. Ca. 247). A corporation may be a defendant in this action.

(iii) *Institution of proceedings*.—It is essential to the plaintiff’s case that the unsuccessful proceedings should have been *instituted* by the defendant. What is meant by this term? It seems to mean, that the machinery of the law must have been set in motion by the defendant, and not by some other person as the result of hearing the defendant’s narrative.

weighing it up judicially, and then acting upon it. If I say to a police inspector or a magistrate: "I charge A. B. with the theft of money from my shop," and in due course A. B. is prosecuted, I apprehend that I may be said to institute that prosecution. But if all I say to the police authorities is: "Some money lying on the counter of my shop has been stolen, and there was in the shop about the time a seedy-looking individual wearing brown boots and a soft felt hat," whereupon the police find and prosecute such a person, then it is not I but the chief constable who instituted those proceedings.

*Contrast with false imprisonment.*—The same point bears upon the distinction between Malicious Prosecution and False Imprisonment, on which the *locus classicus* is a passage from a judgment by Willes, J., in *Austin v. Dowling* (1870) 5 C. P. D. at pp. 539–540. "How long (said his lordship) did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law, whose duty it was to detain him until he could be brought before a judicial officer. *Until he was so brought before the judicial officer, there was no malicious prosecution.* The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment; because he does not set a ministerial officer in motion but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." If I say to a constable: "I give this man in charge for burgling my house,"



and the constable, acting on my statement, arrests him, that is false imprisonment by me, unless my house has been burgled and I had reasonable grounds for suspecting that man to have been the burglar. But if I say: "My house has been burgled; and "here is a piece of the burglar's trousers which he "was good enough to leave on a nail while getting "out," and then the constable finds a man wearing what he believes to be the incriminating trousers, and arrests him, that is not false imprisonment by me; for the constable has exercised his discretion and has acted as a 'judicial officer' (an expression not confined to judges and magistrates), and not as a mere ministerial officer acting at my bidding.

(iv) *What kind of proceedings.*—Although the term, "action for Malicious Prosecution," should perhaps, strictly speaking, be confined to the remedy for unsuccessful and improperly instituted criminal proceedings, an analogous action is available in the case of unsuccessful and malicious bankruptcy proceedings against an individual, and winding-up proceedings against a registered company (*Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q. B. D. 674), and a few other miscellaneous cases of abuse of the more unpleasant forms of legal procedure (see Winfield, *Law of Abuse of Legal Procedure*, ch. vi).

(v) *The damage.*—It is necessary for the plaintiff to prove that he has sustained, as the result of the defendant's wrongful act, one of the three following kinds of damage. "First, damage to a man's fame, "as if the matter whereof he be accused be scandalous. "Secondly, damage to his person, as where a man is "put in danger to lose his life, limb, or liberty. "Thirdly, damage to his property, as where he is "forced to expend money in necessary charges to "acquit himself of the crime of which he is accused. "The action is maintainable if, and only if, it falls

“within one or other of those three heads” (*Wiffen v. Bailey* [1915] 1 K. B. at p. 606).

All ordinary criminal proceedings and bankruptcy or winding-up proceedings necessarily involve damage to reputation or credit; and, therefore, in such cases no express damage need be proved. But the requirement of damage laid down above also operates to eliminate from the scope of the actions under discussion certain proceedings which, though criminal in form, do not necessarily or ordinarily involve scandal to reputation, for instance, “proceedings for “obstructing a highway, or for keeping pigs in an “improper place,” or for driving a motor-cycle without an efficient silencer, or (as in *Wiffen v. Bailey, supra*) a complaint under the Public Health Act, 1875, for failing to abate a nuisance by cleaning a dirty house. Such proceedings do not necessarily involve damage, and, when maliciously instituted and unsuccessful in the result, either give rise to no action, or at any rate only do so if actual damage resulting from them can be proved; and “the difference between solicitor and “client costs and party and party costs is not legal “damage.” Malicious Prosecution is eminently a tort for which a jury may award exemplary or vindictive damages (see p. 507).

#### 4. MAINTENANCE.

This tort is committed by a person who has, without lawful justification, assisted another to institute or carry on civil proceedings, against the plaintiff, or to defend civil proceedings instituted against him by the plaintiff, whereby the plaintiff has sustained actual damage. There seems to be no doubt that the action will lie against a corporation.

This action, which is very old, had declined very much in importance and frequency until it was revived

in *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 1: but during the past few decades it has become more popular.

(i) *The lawful justification*.—The defendant in the action for Maintenance may justify his *primâ facie* tortious intermeddling on the grounds (a) of relationship with the person maintained by blood or marriage: (b) that the person maintained was his servant or (possibly) his master; (c) that the defendant was actuated by *bonâ fide*, though perhaps misinformed, motives of ‘charity,’ an ill-defined term which seems to denote an intention to assist a poor man either simply because he is handicapped by his poverty (*Harris v. Brisco* (1886) 17 Q. B. D. 504) or by reason of some other tie such as “nationality . . . , locality “or common religious belief” (*Holden v. Thompson* [1907] 2 K. B. at p. 493). A fourth ground (d), and one that is not in a very settled condition at present, is that the defendant had “a common and lawful “interest” with the person maintained, in the result of the proceedings in which he intermeddled. The fact that a patent article being sold by you would be depreciated in value if the inventor failed to establish in an action for libel that he was not a ‘quack,’ would not justify you in maintaining him in his action (*Alabaster v. Harness* [1895] 1 Q. B. 339); but the assistance of a customer in an action brought against him as the result of buying your goods instead of a rival’s, is a legitimate act of the defence of your own commercial interests. Whether a sense of public duty may justify a person—for instance, the proprietor of a newspaper—in undertaking the maintenance of proceedings in order to expose what he believes to be a sham and a fraud upon the public, is not clear.

(ii) *The damage*.—The plaintiff must prove that he has sustained actual damage as the result of the

defendant's intermeddling; and the mere fact that he "has had to discharge his legal obligations, or "that he has incurred expenses in endeavouring to "evade them," does not satisfy this requirement (*Neville v. London Express Newspaper Limited* [1919] A. C. at p. 380).

It is not necessary for the plaintiff to prove malice or improper motive in an action for Maintenance, though its presence may be relevant in throwing doubt, for instance, upon alleged *bonâ fide* motives of charity. Nor, so the House of Lords have decided by a majority (*Neville's case, supra*), is the success of the person maintained in the proceedings in which you intermeddled a conclusive answer to an action against you for Maintenance. In both these respects this tort should be contrasted with Malicious Prosecution, as well as in the nature of the proceedings to which they are respectively applicable.

*Champerty*.—Maintenance is the "genus and "champerty the species of that genus"; its distinguishing feature being an agreement (illegal and void, see p. 46) to share the proceeds of the suit maintained. No motive of 'charity' can justify champerty.

#### NOTE ON AUTHORITIES.

[See note at end of next chapter.]



## CHAPTER XXIII.

MISCELLANEOUS TORTS (*continued*).

## 5. PROCURING BREACH OF CONTRACT.

THIS tort is committed *when a person, knowingly and without lawful justification, procures a second person to break his contract with a third person, whereby that third person sustains damage.* As we have seen in the earlier part of this volume, the main effect of the formation of a contract is to create one or more obligations between certain defined persons, namely, the parties to it, A. and B. Those obligations are contractual. But it also has an incidental effect, at any rate in certain cases, namely, to impose automatically upon C. and D., and every other person who becomes aware of the existence of the contract between A. and B., an obligation not, without lawful justification, to inflict damage upon A. or B., by procuring either B. or A. to break his contract with the other. The breach of that obligation is the tort under discussion (*Lumley v. Gye* (1853) 2 E. & B. 216).

“A violation of legal right committed knowingly “is a cause of action; and . . . it is a violation of “legal right to interfere with contractual relations “recognised by law, if there be no sufficient justification for the interference” (per Lord Macnaghten in *Quinn v. Leathem* [1901] A. C. at p. 510).

(i) *To what kinds of contracts applicable?*—The tort occurs mainly in connection with contracts of service; and, until the passing of the Trade Disputes

Act, 1906, was common in the sphere of industrial disputes. But it has also been applied in the case of a contract to sing or to supply building materials, and in the case of a contract made by selling agents with a manufacturer not to sell their goods to persons on a certain 'suspended' list, the breach of which by an agent was procured by the use of fictitious names (*National Phonograph Co. v. Bell* [1908] 1 Ch. 335).

(ii) *What is a lawful justification?*—It is believed, for instance, that a parent would be justified in inducing his child to break off an engagement of marriage with a person of bad character, or that a medical adviser would be justified in inducing a patient to break an agreement of service by not continuing in an occupation which was undermining his health. But the defendant's desire to further his own commercial or industrial interests or those of his fellow-workmen whom it is his duty to guide and advise, is not a sufficient justification, even if there is an absence of any *animus* against the plaintiff and a belief that he too would ultimately benefit from the result of the breach of contract procured (*Glamorgan Coal Co. v. South Wales Miners Federation* [1905] A. C. 239. That is the famous 'stop-day' case, where a desire to maintain the price of coal and so keep up wages, and perhaps profits too, by limiting the output, was held to be no justification for the breaches of miners' contracts procured by the South Wales Miners Federation and its officials).

(iii) *Damage* sustained by the plaintiff must be proved.

*Interference with the making of contracts.*—Such then are the circumstances in which it is actionable to induce a party to a contract to break it. How far is it actionable to induce a person not to make or not to renew a contract? This act is not, in itself, and unaccompanied by unlawful elements, such as violence,

conspiracy, threats, coercion, or molestation, actionable (*Allen v. Flood* [1898] A. C. 1). But the presence of one or more of these inducing or compelling causes will easily make it actionable; for instance, firing at natives on the coast of Africa and thus deterring them from coming to the plaintiff's ship and trading with him (*Tarleton v. McGawley* (1793) 1 Peake 270); or coercion and conspiracy, particularly when there is evidence of a desire to injure the plaintiff (*Quinn v. Leathem* [1901] A. C. 495). When, however, the dominant motive inspiring the defendant's acts of interference is not any "malicious or sinister intent" "as against the plaintiff," but merely a desire to secure a trade monopoly, it seems that a combination of traders may resort to very drastic methods of competition before they become legally responsible for damage sustained by a rival trader as a result of their acts (*Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25). A mere intimation by or on behalf of a large number of persons, that certain consequences will follow if the person addressed does not take a certain course of action, does not necessarily amount to threats or coercion (*White v. Riley* [1921] 1 Ch. 1).

*Trade Disputes Act.*—The importance, however, of this storm centre in the Law of Torts was very greatly diminished by the passing of the Trade Disputes Act, 1906, of which section 3 provides as follows:—

"An act done by a person in contemplation  
 "or furtherance of a trade dispute shall not be  
 "actionable on the ground only that it induces  
 "some other person to break a contract of employ-  
 "ment or that it is an interference with the  
 "trade, business, or employment of some other  
 "person, or with the right of some other person  
 "to dispose of his capital or his labour as he  
 "wills."

## 6. CONSPIRACY.

The question of the true nature of this tort, and indeed of its title to be regarded as a specific tort and not merely as an unlawful element rendering tortious and actionable conduct which is otherwise not actionable, is still so controversial, that more than a passing reference to it would be out of place in this work. It is said, that a criminal conspiracy to injure another person which results in damage to that person is actionable as a tort; but that still leaves open the difficult question of the true scope of criminal conspiracy. It is tolerably clear, that conspiracy may render actionable acts amounting to interference with the making of contracts (*Quinn v. Leathem, supra*); but whether that effect is due to the element of conspiracy *per se*, or to the fact that “numbers may annoy and coerce where one may not” is not so clear. “As a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy” (*per Bowen, L.J., in Mogul Steamship Co. v. McGregor, Gow & Co. (1889) 23 Q. B. D. at p. 616*).

The scope of the effect of conspiracy as forming, or as contributing to form, a cause of action, is much curtailed by section 1 of the Trade Disputes Act, 1906, which provides that—

“An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable, unless the act, if done without any such agreement or combination, would be actionable.”

An important illustration of an action which lay outside the scope of this provision will be found in *Pratt v. British Medical Association* [1919] 1 K. B. 244, where the five defendants were held liable in damages



for “unlawfully molesting” the plaintiffs in their profession by a malicious boycott. The learned judge was invited to regard “actionable conspiracy” as the cause of action, but evidently preferred to treat conspiracy as an element aggravating the unlawful means employed rather than as the substantive cause of action in itself; and the plaintiff recovered damages (see also an article by J. Charlesworth in L. Q. R., XXXVI. (1920), p. 38).

## 7. SEDUCTION.

This tort is committed *when a person deprives the plaintiff of the services of a woman, actually or constructively in his employment, by causing the woman's illness or pregnancy as the result of sexual connection with her, both the seduction and the ensuing illness or pregnancy taking place during the period of the employment.* The party deemed to be injured, for the purpose of this tort, is the employer, who may be, and very frequently is, the woman's parent or some other person standing *in loco parentis* to her. The term ‘seduction’ implies or suggests the consent of the woman, and is to that extent misleading. Her consent to the intercourse is not essential to this tort; but, when she does consent, she herself has no action for damages against her seducer, by reason of the maxim: *volenti non fit injuria*.

Where the servant is the plaintiff's daughter, she is deemed to have been in her parent's service, if she was under twenty-one years of age, unmarried, and not in the service of an employer, or, whatever her age, if she lived at home and performed any domestic service, however slight. But this merciful concession, facilitating an action by an outraged parent, must not be allowed to obscure the fact that “the foundation of the action is not the relationship of parent and

“child but that of master and servant”; and so, where the woman seduced, aged twenty-two, was the adopted daughter of the plaintiff, and was living and rendering domestic services in the house occupied by the plaintiff and her husband, it was the husband who ought to have sued, and the plaintiff’s action failed (*Peters v. Jones* [1914] 2 K. B. 781). But a woman, at any rate if under twenty-one years of age, who has left her employment and is “on her way” “back to resume her former position as a member of “her father’s family” when she is seduced, is in his constructive service, so as to enable him to bring this action (*Terry v. Hutchinson* (1868) L. R. 3 Q. B. 599). Although, in point of form, the action is for compensation for loss of service, the jury are justified in taking the whole of the circumstances into consideration, including the conduct of the plaintiff and the defendant and the woman seduced, and in awarding exemplary or punitive damages.

*Other actions by a master.*—An action for enticing away any servant (including a child living at home and rendering services) may be brought by a master against a person who, knowing of an ‘existing relation’ of service, entices away the servant without lawful justification (*Lumley v. Gye* (1853) 2 E. & B. 216); and an action will lie for receiving or continuing to employ the servant of another, after notice of the servant’s unexpired engagement with the plaintiff. A master also has an action against any person who intentionally or negligently causes personal injury to his servant, resulting in a loss of services, except when the injury results in the servant’s immediate death (*Osborn v. Gillett* (1873) L. R. 8 Ex. 88). But it is said that the injurious act must be tortious as against the servant, and not merely a breach of a contract to which the master is not a party.

## 8. REMEDIES FOR TORTS.

1. *Self-help*.—We have already noticed (pp. 360–361) in our brief review of the most important of the specific torts, that in rare cases the injured party still retains the right to take the law into his own hands, and, being careful not to exceed the limits of that right, to remedy his own wrong. These instances of self-help are collected in the next chapter.

2. *Damages and injunction*.—The usual remedy, however, for a tort, is an action for damages, with or without an injunction, or an action for an injunction alone. Both damages and injunctions are of various kinds, adapted to deal with widely differing injurious acts and omissions; and some account of them will be found later in Chapter XXVII. (pp. 504–508) on Proceedings in the King's Bench Division.

It will also be remembered, that certain torts are also crimes, a subject which is dealt with in Volume IV.

## NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this and the preceding chapter the student should refer to Sir Frederick Pollock, "*Law of Torts*," or Sir John W. Salmond, "*Law of Torts*," or (as to Malicious Prosecution and Maintenance) to Dr. P. H. Winfield, "*Present Law of Abuse of Legal Procedure*." The law will be found in a summary form in the "*Digest of English Civil Law*," pp. 464–486; 536–544. Many of the cases referred to below will be found in Professor Kenny's "*Cases on the Law of Torts*."

The following are some of the chief sources and illustrations of the principles discussed in this chapter :—

*Stanley v. Powell* [1891] 1 Q. B. 86.

*Giles v. Walker* (1890) 24 Q. B. D. 656.

*Earl v. Lubbock* [1905] 1 K. B. 253.

*Cavalier v. Pope* [1906] A. C. 428.

*Huggell v. Miers* [1908] 2 K. B. 278.

*Francis v. Cockerell* (1870) L. R. 5 Q. B. 501.

*Indermaur v. Dames* (1866) L. R. 1 C. P. 274, (1867) L. R. 2 C. P. 311.

*Cooke v. Midland Great Western Railway of Ireland* [1909] A. C. 229.

*H. & C. Grayson, Ltd. v. Ellerman Line, Ltd.* [1920] A. C. 466.

*Blacker v. Lake & Elliot* (1912) 106 *L. T.* 533.

*Rylands v. Fletcher* (1868) *L. R.* 3 *H. L.* 330 ; 1 *Smith's Leading Cases*.

*Whalley v. Lancashire and Yorkshire Railway Co.* (1884) 13 *Q. B. D.* 131.

*Filliter v. Phippard* (1847) 11 *Q. B.* 347.

*Radley v. London & North Western Railway Co.* (1876) *L. R.* 1 *App. Ca.* 754.

*McDowall v. Great Western Railway Co.* [1902] 1 *K. B.* 618 ; [1903] 2 *K. B.* 331.

*Polemis v. Furness, Withy & Co.* [1921] 3 *K. B.* 560.

*Metropolitan Railway Co. v. Jackson* (1877) *L. R.* 3 *App. Ca.* 193.

*Derry v. Peek* (1889) *L. R.* 14 *App. Ca.* 337.

*Langridge v. Levy* (1837) 2 *M. & W.* 519.

*Abrath v. North Eastern Railway Co.* (1883) 11 *Q. B. D.* 440 ; (1886) 11 *App. Ca.* 247.

*Wiffen v. Bailey* [1915] 1 *K. B.* 600.

*Alabaster v. Harness* [1895] 1 *Q. B.* 339.

*Neville v. London Express Newspaper Limited* [1919] *A. C.* 368.

*Lumley v. Gye* (1853) 2 *E. & B.* 216.

*Mogul Steamship Co. v. McGregor Gow & Co.* [1892] *A. C.* 25.

*Allen v. Flood* [1898] *A. C.* 1.

*Quinn v. Leatham* [1901] *A. C.* 495.

*Pratt v. British Medical Association* [1919] 1 *K. B.* 244.

*Terry v. Hutchinson* (1868) *L. R.* 3 *Q. B.* 599.

*Peters v. Jones* [1914] 2 *K. B.* 781.

*Companies (Consolidation) Act*, s. 84.

*Fires Metropolis (Prevention) Act*, 1774.

*Trade Disputes Act*, 1906.]

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## PART III.

*CIVIL PROCEDURE.*

## CHAPTER XXIV.

## SELF-HELP AND ARBITRATION.

BREACHES of contract and torts are usually redressed by means of legal proceedings instituted in a court of justice ; and, accordingly, the rest of this volume will be mainly concerned with a description of the courts of justice established in this country, and of the procedure adopted by them. Historically, redress by the act of the injured party himself, *i.e.*, self-help, precedes, in the development of most legal systems, recourse to a court of justice. Our ancestors, like most primitive peoples, preferred to take the law into their own hands ; but, gradually, as the central power of the State grew stronger, the various extra-judicial remedies were at first discouraged, as tending to violence and oppression, and later in many cases actually prohibited by statute (*e.g.*, 5 Rich. II. st. I. (1381), c. 7) : “an Act against Forcible Entries”). Nevertheless, several of these extra-judicial remedies still survive, of which perhaps the most conspicuous is Distress. Many of them have already been discussed in the preceding pages of this work, and will merely be mentioned here.

The surviving extra-judicial remedies comprise the following varieties of redress, namely,—(1) self-defence ; (2) re-taking of goods ; (3) entry ; (4) abatement ;

(5) seizure of heriots ; (6) accord and satisfaction ; (7) retainer ; (8) lien ; (9) distress for rent ; and (10) other kinds of distress. Of these in their order.

1. *Self-defence of person or property*.—A reasonably necessary amount of force may be used by a person in repelling force applied to his own person, or the person of his parent, or child, or spouse, or master, or servant ; or in resisting a trespasser seeking to enter upon his land, or in ejecting a trespasser from his land ; or (probably) in protecting his personal chattels. This remedy has been discussed at greater length on pp. 283-4.

2. *Re-taking of goods*.—This mode of redress may be resorted to when any one wrongfully deprives another of his goods. The owner of the goods may retake them, wherever he happens to find them ; provided he can do so without committing a breach of the peace or a trespass upon land not in the occupation of the wrongdoer (*Blades v. Higgs* (1861) 10 C. B. N. S. 713). Whether a person entitled to the possession of goods may take them peaceably, even though they have not been removed from his possession, cannot be regarded as clear. If, for instance, my horse is wrongfully taken away, and I find him on a common, or in a fair, or at a public inn, I may lawfully retake him into my possession. But if he is in a private stable, or in private grounds, not being those of the wrong-doer, I may not break open the stable or break into the private grounds to take him out.

3. *Entry*.—A person who has been wrongfully dispossessed of land may enter upon it and retake possession, using only such force as is necessary to remove the trespasser and his goods (see pp. 354-5). A forcible entry is an indictable offence under the Statutes of Forcible Entry (5 Ric. II. (1381) st. I.,

c. 7; 15 Ric. II. (1391) c. 2; 31 Eliz. (1589) c. 11). But the person who was wrongfully in possession cannot maintain an action of trespass to the land against the person entitled to possession who has been guilty of a forcible entry; nor can he sue his ejector for trespass to person or goods, provided the latter has used no more force than was necessary to remove the plaintiff and his goods from the land (*Hemmings v. Stoke Poges Golf Club Limited* [1920] 1 K. B. 720).

4. *Abatement*.—In certain circumstances, the person injured by a nuisance may abate it (pp. 360-1).

5. *Seizure of heriots*.—Where a person is entitled on the death of a tenant of a freehold estate of inheritance to a heriot-service, he may enforce such right either by seizure of the best beast or other thing due, or by distress, in much the same way as a landlord can at Common Law take goods in distress for rent (see pp. 412-427). But for heriot-custom, which is a common incident of copyhold tenure, the lord of the manor, though he may seize the identical thing itself, cannot, in the absence of special custom, distrain any other chattel (see also Vol. II., p. 40).

6. *Accord and satisfaction*.—When a breach of contract or a tort has occurred, the parties respectively entitled to sue, and liable to be sued, may agree upon some satisfaction being made for the wrong, instead of resorting to legal proceedings; and thereupon the agreement ('accord') and the performance of the act agreed upon ('satisfaction') combine together to discharge the right of action (pp. 76-7).

7. *Retainer*.—The right of *retainer* arises where a debtor makes his creditor executor of his will, or where the creditor obtains letters of administration to his debtor. In either of these cases, the law gives the personal representative a remedy for his debt, by allowing him to *retain* out of the legal assets in his

possession so much as will pay himself, before paying any debt of the same degree due to another creditor ; though in practice, since January 1, 1900, the creditor administrator, who obtains administration in that capacity, is deprived of this right by the present form of his bond, which requires him to pay all the debts of the deceased "rateably and proportionably and "according to the priority required by law, not, "however, preferring his own debt or the debt of any "other person by reason of his being administrator "as aforesaid." The nature of this right has been previously discussed at length (Vol. II., pp. 638-640).

8. *Lien*.—The various kinds of Lien recognised by the law are discussed elsewhere in this work (see as to possessory lien, pp. 163-6, as to maritime lien, p. 621).

9. *Distress for rent*.—A landlord or other person legally entitled to the payment of any kind of rent, or other annual sum charged upon land, may distrain for it, if it is in arrear, by seizing the movables (with the exceptions hereinafter mentioned), which he may find on the premises out of which the rent issues, and holding them as a pledge or security for the payment of the arrears, or selling them to satisfy his claim. This right is, despite the severe restrictions which have recently been placed upon it, so valuable, and, by reason of such restrictions, so difficult to exercise safely, that we must dwell upon it at some length. And it will be well to deal in their order with the various conditions under which it may be exercised.

(1) *Time*.—The rent must be *in arrear*. Rent, unless made payable in advance, is usually payable at the end of the period for which it is due, and it is not in arrear until the day after the day fixed for payment. Where the rent claimed is rent-service, the relationship of landlord and tenant must, at the Common Law, be subsisting at the time the rent is



payable and also at the time the distress is made. By the Landlord and Tenant Act, 1709, ss. 6, 7, however, a landlord may, within six months after the determination of a lease, distrain for arrears of rent, where the tenant continues to hold over after the expiration of the term.

(2) *Who may distrain*.—The person in whom the legal reversion is vested is the person entitled to distrain; such as a lessor who has not assigned, or an assignee of the reversion for rent which has fallen due after the assignment, or a mortgagee entitled to payment of rent under a lease granted by the mortgagor (*Moss v. Gallimore* (1779) 1 Dougl. 279; 1 Smith's Leading Cases).

(3) *For what kinds of rent*.—The remedy is, however, now available for the recovery of any kind of rent, whether it is rent-service, rent-charge, or rent seek (see Vol. II., pp. 225–228), or for the apportioned part of a rent; provided the rent is certain in amount, or is capable of being reduced to a certainty, and is in arrear. The Conveyancing Act, 1881, s. 44, enables the person entitled to any annual sum charged upon land, whether by way of rent-charge or otherwise, not being rent incident to a reversion, arising under an instrument coming into operation after the 31st December, 1881, to enter and distrain for any sum due as soon as it is unpaid and in arrear for twenty-one days (see Vol. II., p. 226). The amount of arrears of rent recoverable is limited by the Real Property Limitation Act, 1833, s. 42, to six years; but where the holding is one to which the Agricultural Holdings Acts apply, the landlord cannot distrain for rent that is more than twelve months overdue (Agricultural Holdings Act, 1908, s. 28). Under the Bankruptcy Act, 1914, s. 35, the goods of a bankrupt tenant cannot, after the commencement of the bankruptcy, be distrained for more than six months' rent, if the rent has accrued

due before the order adjudicating him bankrupt ; and, by the same section, and by section 33 (4) of the same Act, further restrictions are placed upon the right of distress in the event of the tenant's bankruptcy. By the Companies (Consolidation) Act, 1908, s. 211, a distress cannot be made (without leave of the Court) against the effects of a company, after the commencement of a winding-up by or under the supervision of the Court.

(4) *What things may be taken.*—The general rule, subject to many common law and statutory exceptions, of which the most important will now be stated, is, that any goods and personal chattels, which are on the premises at the time the distress is made, may be seized, whether belonging to the tenant or not, but not any chattel, whether belonging to the tenant or not, which is not on the premises out of which the rent issues.

(5) *Things absolutely privileged from seizure.*—The following kinds of chattels are absolutely privileged from distress *by the Common Law*, and cannot lawfully be seized for rent :—

- (a) *Wild animals* (in which there can be no absolute property).
- (b) Things in the *actual use* of any person at the time the distress is made ; as, for example, an axe with which a man is cutting wood, a stocking frame on which a person is actually engaged in weaving, or a horse which a man is riding (*Simpson v. Hartopp* (1744) Willes, 512 ; 1 Smith's Leading Cases). These are probably privileged because an attempt to seize them might provoke a breach of the peace.
- (c) Things belonging to a third party which have been delivered to a person carrying on a public trade (an expression which is not so narrow

as a 'common calling,' *e.g.*, common carriers and innkeepers) on the demised premises, to be dealt with *in the way of his trade*; as, for example, a horse sent to a smith to be shod, cloth to a tailor to be made into a coat, corn to a mill to be ground, or goods delivered to a carrier for carriage, or to an auctioneer or commission agent to be sold, or pledged with a pawnbroker, or stored in a wharfinger's warehouse. To come under this ground of privilege, the thing must have been sent or delivered to the tenant, to be 'managed' or dealt with by him in the way of a public trade carried on by him (*Challoner v. Robinson* [1908] 1 Ch. 49). The reason for the privilege is: that trade would be discouraged if a tenant's customers were exposed to the risk of having their goods seized. But the importance of this exception is much diminished by the effect of the Law of Distress Amendment Act, 1908, hereafter explained.

- (d) Things in the *custody of the law*; such as goods which have been taken in execution of a judgment, or have been already taken in distress. But the Landlord and Tenant Act, 1709 (ss. 1, 8), protects the landlord in the case of an execution being levied upon the goods of the tenant, by enabling the landlord, speaking generally, to recover up to one year's rent from the execution creditor, before the goods seized are removed. Notice should be given to the sheriff levying the execution, of the landlord's claim in due time; and a sheriff who wrongfully removes the goods to the detriment of the landlord may be held liable in damages to him. Further, in the case of

county court executions, to which the Act of 1709 does not apply, provision has been made by the County Courts Act, 1888, s. 160, to the effect that, where goods are being taken by a bailiff in execution of a county court judgment, the landlord of the premises may, by giving written notice to the bailiff, require him to distrain also for the rent in arrear, not exceeding the rent of four weeks, where the tenement is let by the week, or the rent of two terms, where it is let for any other term less than a year, and in any other case not exceeding the rent of one year, and to sell enough of the tenant's goods to satisfy such rent, in priority and addition to the amount for which the execution warrant has been issued. But the right of the landlord under the Acts of 1709 and 1888 is (as we have seen) limited by the Bankruptcy Act, 1914, s. 35 (2), to six months' rent, if the tenant becomes bankrupt, and his bankruptcy commenced before the sheriff or the bailiff received notice of the landlord's claim.

- (e) *Perishable goods*, such as meat or milk, because they cannot be restored in the same plight ; for, by the Common Law, a distress was merely a pledge, and could not be sold, and such goods cannot after seizure be restored to the owner in the same condition on payment of the rent. But, by virtue of statute (2 W. & M. (1689) c. 5), hay or corn, as soon as it is reaped, may be distrained ; and so also may growing corn or crops. Similarly, loose money is privileged ; but not money in a sealed bag.
- (f) *Fixtures*, or things fixed to the freehold, which cannot be removed without damage to themselves or to the freehold, such as fixed



machinery, or which are regarded as a permanent part of the freehold, such as kitchen ranges, grates, keys, or title deeds.

- (g) *Chattels of the Crown*, e.g., a horse lent to a member of the Yeomanry (*Secretary of State v. Wynne* [1905] 2 K. B. 845).

The following things are absolutely privileged *by statute* :—

- (h) Under the Agricultural Holdings Act, 1908, s. 29, *machinery belonging to a third party* and lent to the tenant of an agricultural holding under a *bonâ fide* agreement, or live stock lent solely for breeding purposes.
- (i) Under the Law of Distress Amendment Act, 1888, s. 4, the *wearing apparel and bedding* of the tenant and his family, and *the tools and implements of his trade*, not exceeding £5 in value ; but, in an action by the tenant against the landlord for damages for wrongful distress in contravention of this provision, the burden of proof is on the tenant to prove that the landlord did not leave £5 worth of these goods on the premises.
- (j) Under the Law of Distress Amendment Act, 1908, amplifying the principle of the Lodgers' Goods Protection Act, 1871, which is thereby repealed in so far as it is replaced, the antient severity of this branch of the law is still further mitigated. For by the later statute—(1) any lodger, (2) most under-tenants, and (3) most other persons not being tenants of the premises and having no beneficial interest therein, can, by complying with the terms of the statute, protect their goods from distress ; the lodger and under-tenant from distress for rent due from their immediate landlords, and other persons from distress for rent owed by the

tenant of the premises on which the goods may be situate. To obtain this protection, the claimant must, after the distress has been levied or authorised, serve on the distraining landlord or bailiff a written declaration and inventory. The declaration must state that the goods distrained or threatened are the property or in the lawful possession of the claimant, and that the immediate tenant has no property or beneficial interest therein ; and (in the case of an under-tenant or lodger) must also state what rent, if any, is due from him to his immediate landlord, and contain an undertaking to pay to the superior landlord any rent so due or to become due from him to his immediate landlord, until the arrears of rent have been paid off. To the declaration, in either case, must be annexed a correct inventory, subscribed by the claimant, of the goods referred to in the declaration. It is a misdemeanor for a claimant to make or subscribe a declaration or inventory knowing it to be untrue in any material particular. If, after the claimant has so complied with the terms of the Act, the distraining landlord, or his bailiff, proceeds to distrain the claimant's goods, he is guilty of an illegal distress, and is liable to be sued for damages ; but the claimant may, instead of bringing an action for damages, apply to a court of summary jurisdiction for an order for the restoration of the goods. Certain under-tenants and other persons, such as the spouse of the tenant whose rent is in arrear, or the grantee of a bill of sale given by the tenant (but not the grantee of a bill of sale given by the tenant's wife), are excluded from the benefit of the provisions of the Act.

- (k) Under various statutes, railway rolling stock, gas meters or fittings belonging to a gas company, water or electric light fittings belonging to water supply or electric light companies, frames, looms, and other plant used in textile manufactures, are also protected from seizure under distress for rent, in the circumstances specified in the various statutes.
- (l) The Diplomatic Privileges Act, 1707, protects from distress the goods of duly accredited foreign Ambassadors and Ministers, and of their duly registered domestic servants.
- (m) The National Insurance Act, 1911, s. 68, protects from distress the goods of an insured person which are upon premises occupied by him, if a medical certificate to the effect that the levying of the distress would endanger his life is granted.

(6) *Things conditionally privileged from seizure.*—The following things are exempted at Common Law or by statute from seizure, if there are other distrainable chattels on the premises sufficient to satisfy the landlord's claim, but not otherwise :—

- (a) Beasts of the plough, sheep, and instruments of husbandry.
- (b) Tools and implements of trade, which, as we have already seen (p. 417), are absolutely privileged in the circumstances mentioned in section 4 of the Law of Distress Amendment Act, 1888.
- (c) Growing crops seized or sold under a writ of execution are liable, so long as they remain on the tenant's land, to be distrained, but only for rent accruing due after the seizure or sale (Landlord and Tenant Act, 1851, s. 2).
- (d) Under the Agricultural Holdings Act, 1908, s. 29, live stock of a third party brought on to an

agricultural holding to be 'agisted,' or fed, at a fair price in money or kind, may, if there is no other sufficient distress, be distrained, but only for the amount of the price then remaining due for agistment. The owner of the stock may, at any time before it is sold, redeem it, by paying to the distrainor the sum so due.

(7) *Goods fraudulently or clandestinely removed.*—To the rule that no goods can be taken in distress which are not on the premises out of which the rent issues, an important exception was introduced by the Distress for Rent Act, 1737, s. 1, to protect the landlord from being deprived of his remedy by the tenant fraudulently or clandestinely removing his goods to other premises to avoid distress. The statute enables the landlord to follow the goods and seize them wherever he can find them within thirty days after their removal; provided that the goods belonged to the tenant at the time of their removal, and were removed with the fraudulent intention of depriving the landlord of his remedy. But this right cannot be exercised if the goods have, since the date of their removal, been sold to a *bonâ fide* purchaser.

The Act of 1737 does not give the landlord any remedy where goods belonging to a third person are removed from the tenant's premises to avoid a threatened distress; or where the tenant, when his goods are distrained, is no longer in possession of the demised premises. But, where the right given by the statute can be exercised, any building in which it is suspected that the goods are concealed, may, with the assistance of a constable, be broken into in the day-time; though, if it is a dwelling-house, oath must first be made before a Justice of the Peace of reasonable grounds for the suspicion. The landlord is entitled under the statute (s. 3) to recover by action of debt from the tenant, or any person who assists in the



fraudulent removal or concealment of the goods, a penalty of double their value ; or, if their value does not exceed £50, he may recover the penalty by proceedings in a court of summary jurisdiction (s. 4).

(8) *The bailiff*.—A distress can only be levied by the person to whom the rent is due, or by his duly authorised bailiff. No person may act as bailiff, to levy a distress, unless authorised by a certificate in writing of a county court judge or registrar. Thus, the managing director of a company cannot, unless he is a duly certificated bailiff, lawfully distrain for rent due to the company. It is the usual and more prudent course to employ a bailiff ; and it is also usual, but not necessary, for the bailiff to have an authority in writing, called a *distress warrant*, from the person employing him, authorising him to distrain on certain specified premises for the specified amount of rent due, and the cost of the distress.

(9) *Entry and seizure*.—The first step in levying a distress is, to *enter* on the premises out of which the rent issues. The entry must be made in the daytime (*i.e.* after sunrise and before sunset) and peaceably ; though any method of entry which is not forcible may be used, for instance, climbing over an adjoining wall. The outer door must not be broken (*Semayne's Case* (1604) 5 Rep. 91 ; 1 Smith's Leading Cases) ; nor must entry be made by opening a closed window. After admission into the premises has been obtained in a peaceable manner, the distrainor may be justified in breaking open an inner door or cupboard to find distrainable goods.

After entry, the next step is to *seize* sufficient goods to satisfy the arrears of rent due and the costs of the distress. Physical grasping is not necessary ; and the seizure may be constructive. A touching or other indication of some chattels in the name of all is good as a seizure of all ; and it is enough if the distrainor

takes any means to express his intention to distrain for rent in arrear, and to prevent, although ineffectually, the removal of the goods from the premises—as, for example, by declaring that the goods must not be removed until the rent is paid.

(10) *Impounding*.—After seizure, the next step is to *impound* the goods ; that is, to put them in the custody of the law. Formerly goods could only be impounded by removing them from the premises, and putting them in a public or private pound. But, under the Distress for Rent Act, 1737, s. 10, it was made lawful to impound the goods on the premises. No particular act is necessary to constitute an impounding on the premises. It is sufficient if an inventory is made of the goods distrained, and served, with notice of the distress, on the tenant. It is not necessary to remove or lock up any of the goods ; but they may, with the assent and for the convenience of the tenant, be left in their ordinary position. It is usual in those circumstances to leave a man in possession to prevent the removal of the goods from the premises ; but this precaution is not legally necessary, as, once the goods are impounded, they are in the custody of the law, and it is unlawful to remove them. An action for treble damages for ‘ pound breach ’ or ‘ rescue ’ of goods distrained is maintainable by a landlord, without proof of any special damage suffered by him (2 W. & M. (1689), c. 5, s. 4).

The distrainor must not seize more goods than are reasonably sufficient to satisfy the arrears of rent and costs. An excessive distress is unlawful at Common Law, and is forbidden by statute. The distrainor guilty of an excessive distress is liable to damages for the value of the goods less the rent in arrear, and expenses ; or, if the goods have not been sold, for the damage, if any, suffered by the temporary loss of their use. But he ought to seize sufficient to cover the

amount due ; because it is unlawful to distrain twice for the same arrears, even if the first distress was abandoned ; unless an honest mistake was made as to the value of the goods, or the first distress was illegal, or its fruits were lost owing to the tenant's act, or the goods on the premises at the time of the first distress were not sufficient to satisfy the claim.

(11) *Sale*.—After impounding the goods, the next step usually taken is to sell them under powers conferred, and conditions imposed, by a series of statutes beginning with 2 W. & M. (1689), c. 5, and including the Law of Distress Amendment Acts, 1888 and 1895, and the Distress for Rent Rules, 1920, issued thereunder ; unless they are *replevied* (see pp. 425–426) by the tenant or owner, or the arrears of rent together with the costs of the distress are paid. By the Common Law, goods distrained for rent could not be sold, but were merely detained by the landlord as a pledge or security for the payment of the rent in arrear ; and this power the landlord still possesses, and can exercise instead of the statutory power of sale. When a sale of the goods is intended, notice in writing of the distress must be given and served personally on the tenant, or left at some conspicuous place on the premises ; and this is usually done by serving the tenant with a copy of the inventory showing what goods have been seized, and with it a notice specifying the amount of rent in arrear. Before the passing of the Law of Distress Amendment Act, 1888, it was necessary to have the goods *appraised* (or valued) before sale ; but the Act has dispensed with this necessity, except when the tenant or owner of the goods gives notice in writing requiring the goods to be appraised before sale. Whenever an appraisement is so required, the value of the goods must, before sale, be ascertained by two reasonably competent and disinterested appraisers, at the expense of the tenant or owner of the goods

requiring it. The appraisement is usually written on the inventory and signed by the appraisers.

The distrainor may sell the goods within a reasonable time after five clear days, or, if so required by written notice from the tenant or owner of the goods, after fifteen clear days from the taking of the distress and giving notice thereof to the tenant. The goods may be sold on or off the premises, and by auction or by private bargain; but the tenant or owner may, by giving notice in writing, require the goods to be removed at his risk and expense to a public auction room or other place specified in the notice, and there sold. The landlord cannot purchase the goods himself, even if they are sold at public auction (*Moore, Nettlefold & Co. v. Singer* [1904] 1 K. B. 820).

The goods must be sold for the best price obtainable, and the surplus proceeds, if any, after satisfaction of the rent and expenses, paid to the tenant or owner of the goods sold. The costs of distress are regulated by the Distress for Rent Rules, 1920, which provide a Table of fees, charges, and expenses, varying according as the amount of rent demanded and due does, or does not, exceed £20. An unconditional tender to the landlord or his duly authorised agent of the proper amount of rent due, if made before the entry, determines the right to distrain; but if a tender is made after seizure and before impounding, or after impounding and before sale, it must include the costs of the distress, properly incurred up to the date of tender.

(12) *Illegal distress*.—A distress for rent is *illegal* if no rent is in arrear, or (where the rent distrained for is rent-service) if no tenancy exists, at the time the goods are taken; or if the person levying the distress is not the person to whom the rent is payable, nor a certified bailiff; or where a valid tender of the rent due has been made before seizure; or if the entry



was not made peaceably, or was made at night, or on a Sunday; or if the goods seized are privileged from distress; or if a second distress is vexatiously made for arrears of rent previously distrained for; and in many other circumstances.

The remedies for an illegal distress are as follows:—

(a) *Retaking*. The tenant or owner may retake the goods; provided he can do so without committing a breach of the peace or a trespass, and before they are impounded.

(b) *Replevin*. At any time before the goods are sold, but within six years of the accrual of his right, the tenant may *replevy* them, by applying to the registrar of the county court of the district in which the goods were seized, for a warrant directing the bailiff of the court to seize and deliver the goods to the applicant (County Courts Act, 1888, ss. 133–137). Before the warrant can be issued, the applicant must give the registrar notice of his intention to replevy, and state in the notice whether he intends to bring his action of replevin in the county court or in the High Court. He must give security by deposit of money or by bond for an amount fixed by the registrar as sufficient to cover the rent alleged to be due, and the probable costs of the action of replevin. The bond or deposit is given to secure performance of the applicant's undertaking to commence his action of replevin within one month if he elects to sue in the county court, or within one week if he elects to bring his action in the High Court, to prosecute the action without delay, and to return the goods to the landlord if so ordered by the judgment in the replevin action. When there is good ground for believing that the title to land exceeding £20 in annual rent or value is in question, or when the amount of the rent alleged to be in arrear, on the value of the goods seized, exceeds £20, the action may be brought in the

High Court ; or, if brought in the county court, it may, on application made in chambers in the High Court by the defendant, and on his giving security for a sum not exceeding £150, be removed by writ of *certiorari* into the High Court. In the action of replevin the tenant, the replevisor, is the plaintiff, and the landlord or his bailiff, or both of them, the defendants ; and the question to be decided is, in effect, the regularity of the distress.

(c) *Action for damages* for trespass, or conversion, or for wrongful detention of the goods seized. Where a person is guilty of an *illegal*, as distinguished from a merely excessive or irregular distress, he is deemed in law to be a *trespasser ab initio* (*Six Carpenters' Case* (1610) 8 Rep. 146 a ; 1 Smith's Leading Cases) ; and his entry on the premises, and every subsequent act done in relation to the distress, are unlawful. The damages recoverable for an illegal seizure and sale of goods are the value of the goods ; though, if the distress has been withdrawn before the removal of the goods, the actual damage only can be recovered. But if no rent was in arrear at all, and the goods have been sold, the owner is entitled to recover double their value under the statute 2 W. & M. (1689), c. 5, s. 4.

(d) *Proceedings in a court of summary jurisdiction* under the provisions of some statute ; as, for example, a statute enabling the owner of goods privileged by the statute from seizure to obtain a summary order from the Justices for their delivery up, or for payment of their value, if they have been sold. Under the Metropolis Police Courts Act, 1839, s. 39, magistrates have also power, in cases of wrongful distress upon weekly or monthly tenants, or upon tenants whose rent does not exceed £15 a year, to summon the parties, and adjudicate summarily upon the matter.

(13) *Irregular distress*.—When a landlord lawfully enters on his tenant's premises to distrain for rent

justly due, but, in the course of carrying out the distress, he commits any *irregularity*, subsequent to the seizure of the goods, it is provided by the Distress for Rent Act, 1737, ss. 19 and 20, that the distress shall not thereby be deemed unlawful, nor the distrainor a trespasser *ab initio* (*Six Carpenters' Case, supra*) ; but the tenant or other party aggrieved by the irregularity may, if he has suffered special damage, recover damages, unless a proper tender of amends has been made before action brought. Thus, if the landlord sells the goods prematurely, or without notice, or without appraisement (after being duly served with notice to appraise), he is guilty of an irregular but not an illegal distress, and is only liable for the actual damage caused by the irregularity. But the protection given by the Act only applies where the distress was originally lawful ; and it does not relieve a person who makes a forcible entry, or seizes privileged goods ; or commits more than a mere irregularity, from his common law liabilities.

Finally, it should be observed that the right of a landlord to recover rent by action is suspended so long as goods distrained remain in his hands or control unsold.

10. *Other kinds of distress.*—Of much less practical importance than the remedy of distress for rent, is the somewhat analogous remedy of *distress damage feasant*, which entitles a person on whose land the cattle of another trespass and commit damage, either to the freehold or to other animals, or the goods of another are unlawfully placed, to seize and impound them, until their owner pays compensation for the damage committed. The remedy cannot be exercised if the trespass was due to the injured party's own negligence, *e.g.*, to his failure to repair fences which he ought to have repaired ; and chattels or animals in actual use may not be seized. If the party injured distrain, he

cannot, while he holds the distress, also sue for the damage. A modern instance of the exercise of distress damage feasant will be found in *Boden v. Roscoe* [1894] 1 Q. B. 608.

Owing to the simple and effective character of the remedy by distress, it is in many cases authorised by statute to enforce the payment of rates and taxes and other duties imposed by Act of Parliament. There is also a right of distress for a neglect to do suit in the lord's court, or to pay amercements legally imposed by a court leet or court baron; but in these cases, and in the case of distress damage feasant, there is no right of sale.

#### ARBITRATION.

Voluntary arbitration is not strictly a species of self-help, but a means of settling disputes by referring them to an extra-judicial person or persons or tribunal (either agreed upon in advance, or *ad hoc* when a particular dispute arises), and agreeing to be bound by the decision of that person or body. It is largely resorted to in commercial matters, when the disputants wish to have the matter at issue between them disposed of by some person who is familiar with the usages and intricacies of their trade; it is also useful in partnership disputes, where the common interests of the partners make the privacy of an arbitrator's room preferable to the publicity of a court of law. Another important class of question constantly being referred to arbitration is that of claims upon life or fire insurance policies. These are, however, merely illustrations; and any dispute in any matter affecting the civil rights of the parties to it may be referred by them to the decision of an arbitrator or umpire. An agreement by which persons refer existing or future differences to arbitration is called a 'submission';



and the decision of the arbitrator or umpire is called an 'award.' Every person capable of making a contract may enter into a binding submission to arbitration. The submission may be by word of mouth, but is usually made in writing. When the submission is in writing, the provisions of the Arbitration Act, 1889, apply; unless a contrary intention is expressed in the agreement. We shall therefore consider briefly the effects of a written submission to which the Act applies.

*Appointment of arbitrators.*—The arbitrator may be named in the submission, or may be left to be appointed at a future time. Many forms of contract in general use contain a clause providing that if any dispute between the parties should arise out of the contract, it shall be referred to arbitration; and the contract frequently names one or more alternative arbitrators, or prescribes a method for their selection, for instance, by the nomination of the Lord Chief Justice of England or the President of some professional or commercial association. If no other mode of reference is provided in the submission, the reference is to a single arbitrator. When the parties disagree as to the person to be appointed, or if the person appointed refuses or is unable to act, the Court may, on the application of either party, appoint an arbitrator. Arbitration may be, and usually is, an entirely extra-judicial proceeding; but, under the Arbitration Act, 1889, means of access to the High Court are provided in the event of its assistance being required in the course of the proceedings. Applications to the Court under the Act are made, if in the King's Bench Division, by summons before a Master in chambers (except in a few cases, such as an application to remove an arbitrator for misconduct or to set aside an award, where they must be made on motion), and if in the Chancery Division, on motion to the Judge in chambers

or in court. When an arbitrator is appointed, his authority cannot be revoked by either party, except by leave of the Court.

If the submission provides that the reference is to be to two arbitrators, one to be appointed by each party, and one of the parties refuses to appoint his arbitrator, after being served with a seven days' notice by the other party, the party who has already nominated his arbitrator may appoint him to act as sole arbitrator; and that arbitrator's award will be binding on both parties, as if he had been appointed by consent (Act of 1889, s. 6). Where two arbitrators are appointed, they may appoint an umpire, either before or after disagreement, or, if they do not appoint an umpire, or he refuses to act, the Court may appoint one. The practice of appointing two arbitrators, with power to appoint an umpire, cannot be regarded as entirely satisfactory. Too frequently each arbitrator regards himself as the representative of the party appointing him, rather than as sitting in a judicial capacity; an attitude of mind which is encouraged by the knowledge that, if they disagree (as arbitrators taking this view of their functions probably will), there is a third and impartial person, the umpire, who will do justice between the parties. On grounds of economy both of time and money many persons regard the system of appointing a sole arbitrator in the first instance as preferable to the appointment of two arbitrators with power to appoint an umpire.

Sometimes the submission provides that the reference is to be to three arbitrators, as distinguished from two arbitrators and an umpire. This form of submission is undesirable; although section 16 of the Administration of Justice Act, 1920, has remedied some of the inconveniences that were apt to arise upon it.

*Effect of a submission.*—A submission has this important effect on the right to bring an action: viz., if a party to a submission brings an action against the other party to it, in respect of any matter which they have agreed to refer to arbitration, the defendant may apply to the court for an order to *stay the proceedings*. The application *may* be made after the defendant has entered an appearance, but *must* be made before he takes any other step in the action, as, for example, by applying to the Court for an order that the plaintiff give security for costs, or for discovery, or for leave to deliver a defence or to administer interrogatories, or by acquiescing without objection in an order made on the plaintiff's summons for directions, or by delivering a defence. But negotiations or correspondence between the parties or their solicitors with reference to the action, or the defendant's request to the plaintiff for further time to deliver his defence, do not constitute steps in the proceedings; so as to bar an application to stay. In support of the application, the defendant must show by affidavit that the action relates to a dispute which falls within the terms of the submission, and that he was, and is still, willing to do all things necessary to the proper conduct of the arbitration. The defendant is *primâ facie* entitled to have the action stayed; unless the plaintiff can satisfy the Master or the Judge that the matters in dispute ought not to be decided by arbitration. The Court has a discretionary power to refuse to grant a stay; and has refused a stay where the only question in the case was one of law, or was more suitable for decision by the Court than by an arbitrator, or where there was a charge of fraud against the plaintiff which he desired to be investigated and disposed of in open court, or where the arbitrator agreed upon had a secret interest in the case, or was otherwise an unfit person to act as arbitrator between the parties.

The Court, in refusing to stay proceedings, is, in effect, acquiescing in the agreement of the parties to suspend its jurisdiction; as Viscount Haldane said in *Jureidini v. National British etc. Insurance Co.* [1915] A. C. at p. 505 (a case of a claim on a fire insurance policy), "by the law of this country you can make "most contracts which you desire, and, among others, "a contract that you will not come under a liability "under a contract unless that liability is defined in a "particular way, it may be by arbitration." But where, in a dispute arising upon a contract, one party raises a defence which goes to the very root of the matter, for instance, when a fire insurance company alleges arson or fraud on the part of the assured, either of which by the terms of the policy entails a forfeiture of all benefits under the policy, that party cannot plead an agreement to refer to arbitration as a bar to an action brought to enforce the contract (*Jureidini's Case, supra*).

*Powers of the arbitrator or umpire.*—The arbitrator or umpire may examine the parties to the reference, and witnesses, on oath or affirmation, and compel the production of documents in their possession relating to the matters in dispute. Witnesses may be summoned by *subpœna* to give evidence or produce documents. If any question of law arises in the course of the reference, the arbitrator may, on his own initiative or at the request of either party, state such question of law in the form of a *special case* for the opinion of the Court under s. 19 of the Arbitration Act, 1889 (sometimes called a 'consultative case' to distinguish it from an award in the form of a 'special case'), and delay making his award until the Court has decided the question of law submitted. If the arbitrator refuses, at the reasonable request of either party, to state a case, he may be compelled to do so by order of the Court. The application to the Court



must be made before the arbitrator makes his award ; and it may be made before he has indicated his opinion on the point of law raised. If the arbitrator, after refusing without reasonable grounds to state a case, or to adjourn the reference pending an application to the Court, makes his award before such application can be made, the Court may set the award aside on the ground of the arbitrator's misconduct. A special case stated under s. 19 of the Arbitration Act, 1889, for the opinion of the Court is, in the King's Bench Division, argued before a Divisional Court: and there is no appeal from its decision on the question of law stated for its opinion, its jurisdiction being merely consultative. But if, subsequently, a motion to set aside the award on the ground of error on the face of it comes before the Court of Appeal on appeal from the Divisional Court, the Court of Appeal is not bound by the opinion of the Divisional Court obtained upon a 'consultative case' and embodied in the award, and may set aside the award on the ground of error on the face of it (*British Westinghouse Electric Co. v. Underground Electric Tramways* [1912] A. C. 673). This procedure of stating a *question of law* in the form of a special case for the opinion of the Court, pending the arbitration, must be distinguished from the method (permitted by section 7 of the same Act) of stating an *award* in the form of a special case (see p. 434).

*Making the award.*—The arbitrator must make his award in writing ; and, in the absence of any term in the submission to the contrary, within three months after entering on the reference. But the time for making the award may be enlarged by any writing signed by the arbitrator, or by order of the Court, if the time for making the award has already expired. Unless the submission expresses a contrary intention, the arbitrator may, in his award, deal with the question of the costs of the reference and the award,

according to his discretion. He may direct to and by whom, and in what proportion, the costs are to be paid, and may tax or settle the amount to be paid, and may even award costs to be paid as between solicitor and client ; but he has no power to order a party (*e.g.*, a foreign corporation) to give security for costs. An arbitrator is usually entitled to be remunerated for his services, even if there is no express agreement to pay his fees ; and he can maintain an action for them. He has also a lien on the award for the amount of his fees ; and, in practice, usually retains possession of the award until they are paid.

An arbitrator, after making his award, has power to correct any clerical error arising from any accidental slip or omission ; but he cannot make any material alteration in his finding, unless the award is remitted by the Court to him for reconsideration. If the rights of the parties depend on questions of law, the arbitrator has power to state his award in the form of a *special case* for the opinion of the Court, and frequently embodies in it alternative directions in the event of the Court finding his award to be erroneous in point of law. If he adopts this course, he ought to set out in the award all the material facts found by him, and leave the Court to determine on those facts the respective rights of the parties. On stating his award in the form of a special case, the arbitrator exhausts his powers, and becomes *functus officio* ; unless his powers are revived by the Court sending back the award to him for reconsideration. In the King's Bench Division, an award stated in the form of a special case is argued before a single Judge ; and an appeal lies from his decision to the Court of Appeal without leave.

*Setting aside or remitting an award.*—The Court may set an award aside where the arbitrator or umpire has been guilty of misconduct, or the award has been

improperly procured, or is bad in point of law on the face of it. But, instead of setting it aside, the Court has a discretionary power to remit it to the arbitrator for reconsideration and amendment. An application to set aside an award is made in the King's Bench Division by notice of motion to the Divisional Court, and must be made within six weeks from the date of the publication of the award (R. S. C. Order LXIV., r. 14).

*Enforcing an award.*—An award is *prima facie* final and binding on the parties to the submission and the persons claiming under them. It may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect. The application (which is usually made in the King's Bench Division) is by *originating summons*, and is generally granted; unless there is a doubt as to the validity of the award. If it is granted, the award can be enforced by any of the modes of execution appropriate to a judgment to the same effect. In some cases, leave to enforce the award may be refused on the ground of doubt as to the validity of the agreement under which the arbitration took place; thereupon the party in whose favour the award is made may bring an action on it, and thus obtain a decision upon the validity of the award.

*Other kinds of arbitration.*—In these pages we have been describing the procedure which is popularly known as Arbitration, more technically described in the words of the Arbitration Act, 1889, as 'References by consent out of Court.' It must, however, be remembered, that the same Act and the Rules of the Supreme Court make provision for 'References under Order of Court,' which are either 'References for Inquiry and Report' by an official or special referee, or 'References for Trial,' before a special referee or arbitrator agreed upon by the parties, or before an

official referee or other officer of the Court, of questions such as those involving long and detailed investigation of accounts and documents. There are also a number of Acts of Parliament which provide for the compulsory arbitration of claims and disputes, for instance, of the amount of compensation payable upon the compulsory acquisition of land.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter, the student should refer, for Distress, to Woodfall's "*Law of Landlord and Tenant*," and generally for Self-help to Sir Frederick Pollock, "*Law of Torts*," or Sir John W. Salmond, "*Law of Torts*." Upon Arbitration the notes to the Arbitration Act, 1889, in the "*Yearly Practice*," vol. II., will be found useful. Certain kinds of Self-help are dealt with in the "*Digest of English Civil Law*," pp. 82-84.]

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## CHAPTER XXV.

THE REMEDY BY ACTION GENERALLY, AND THE  
LIMITATION OF ACTIONS.

HAVING thus briefly described the extra-judicial remedies open to a person who has suffered a civil injury, we shall now proceed to the consideration of the remedies by action for redressing civil injuries.

*Definition.*—The term ‘action’ is used in more senses than one. It is defined by the Judicature Act, 1873, s. 100, as “a civil proceeding commenced by “writ, or in such other manner as may be prescribed “by Rules of Court,” and it “shall not include any “criminal proceeding by the Crown.” Less technically, it means “a litigation in a civil court for the “recovery of individual right or redress of individual “wrong” (Stroud’s *Judicial Dictionary*). There are, however, many proceedings which may be instituted in the High Court which are not actions. For example, proceedings in the Divorce Division are commenced by *petition*, bankruptcy proceedings in the Chancery Division, and applications in the same Division under the Companies (Consolidation) Act, 1908, for the winding up of companies, or under the Trustee Act, 1893, are also commenced by *petition*. Many applications, not necessarily in any pending action, are made on *motion*; as, for example, an application to set aside an arbitrator’s award on the ground of misconduct, an application for a writ of *mandamus*, or an application to amend the Registers

of Trade Marks or Companies. The decision of the Court on a question of law may, as we have seen (p. 434), be sought in the form of a *special case* for the opinion of the Court, stated by an arbitrator or the judge of an inferior court, for his guidance in dealing with a matter before him. But proceedings commenced by *originating summons* (pp. 586–594) are, when that is the mode prescribed by Rules under the Judicature Acts, probably ‘actions.’

*Forms of action.*—Before the passing of the Judicature Act, 1873, actions in the courts of Common Law were usually classified as actions of contract and actions of tort. These were all *personal actions*, *i.e.*, actions based upon the defendant’s personal liability to do some act or suffer some liability; the old *real actions*, which sought the recovery of some specific piece of land, having been almost entirely swept away by the Real Property Limitation Act, 1833, and completely by the Common Law Procedure Act, 1860. Since 1875, when the Judicature Act, 1873, took effect, an action to recover land, though still often called an ‘action of ejectment,’ has been commenced, like an ordinary action, by writ of summons. Proceedings in the courts of Equity were, before the passing of the Judicature Act, 1873, known as ‘suits.’

Of personal actions there were eight principal forms: viz. Debt, Covenant, Assumpsit, Trespass, Detinue, Trover, Replevin, and Trespass on the Case. The first three were associated with breaches of contract; and the remaining five with torts. Assumpsit owed its origin to Trespass, being a variety of Trespass on the Case, and so, although the normal remedy for damages for breach of contract, was in origin tortious. Detinue (pp. 364–5), though in later times associated with the tort of the wrongful withholding of chattels, was also useful in enforcing certain contracts, and was for some purposes regarded as

contractual (*Bryant v. Herbert* (1878) 3 C. P. D. 189 ; *id.* 389). In spite of the fact that special forms of actions have been abolished by modern legislation, it is necessary to say a few words about this old classification ; because it contains the germs of the distinctions between the various classes of contracts and torts discussed in Parts I. and II. of this volume, and thus really is the seed-plot of the modern Law of Obligations.

(1) An action of *Debt* lay to recover a certain sum of money alleged to be due from the defendant to the plaintiff (Vol. II., pp. 546–551) ; (2) of *Covenant*, to recover damages for breach of a contract under seal ; (3) of *Assumpsit*, to recover damages for breach of a contract (or, as it was more technically called, a ‘special promise’) not under seal. (4) An action of *Trespass* lay to recover damages for any disturbance or violation of the plaintiff’s possession of land or goods, or for any direct and forcible injury to his person ; (5) of *Detinue*, to recover possession of any chattel wrongfully detained, or its value, if the defendant could or would not restore it to the plaintiff ; (6) of *Trover* or *Conversion*, to recover the value of goods as damages from any other person who had got possession of them and converted them to his own use ; (7) of *Replevin*, usually, to recover damages for unlawful distress levied on the plaintiff’s goods or cattle ; and (8) of *Trespass on the Case*, which was the general remedy, in cases not falling within any of the other forms, for personal wrongs and injuries without force (see *Scott v. Shepherd* (1772) 2 W. Bl. 892). These forms represented the successive steps by which the jurisdiction of the common law courts in personal actions had arisen ; and the plaintiff had to be careful to select the proper form of action, because, if he chose the wrong one, he would be non-suited and have to pay the defendant’s costs, even though he

had on the facts a good cause of action. This was one of the great scandals of the old common law procedure ; and it was an immense step towards reform when the Common Law Procedure Act, 1852, introduced, in place of these forms of action, simple statements of the cause of action relied on. Since the passing of the Judicature Act, 1873, all of the above-mentioned kinds of action are commenced in the same way, by a writ of summons endorsed with a statement of the nature of the claim made or the relief or remedy sought ; and it is no longer necessary to state in what form the plaintiff is suing. The material facts relied on are stated in the pleadings ; and, on the facts as alleged and proved, the court will, as a rule, give the plaintiff whatever relief or remedy he is entitled to, irrespective of the form in which he may have brought his action.

Thus it will be seen that, so far as the form of proceedings is concerned, a knowledge of the old varieties of action is not now material. With regard, however, to the substance of the rights of the parties, the old proceedings are of importance ; for it is by a careful study of them that an exact knowledge of the nature and extent of the wrong complained of, and the remedies therefor, is often best obtained. For, as has been said before, the Judicature Acts, though they have profoundly changed legal procedure, were not (except in certain specified instances) intended to change, and have not changed, the substantial rights of the parties. Thus, for example, if we wish to know exactly what constitutes the tort of Trespass, or who may bring an action of Trespass, or against whom such an action can be brought, we can hardly do better than look up the old precedents of pleading in such cases. There the law of the subject will be found expressed with accuracy and precision.

*Local and transitory actions.*—Actions used also to be classed as *local* or *transitory* ; the former being



founded on such causes of action as necessarily refer to some particular locality, as in the case of trespass to land ; the latter on such causes of action as may take place anywhere, as in the case of trespass to goods, debt, and the like. Thus, all real actions were local ; and most personal actions were transitory. Local actions had formerly, as the general rule, to be tried in the county where the cause of action arose, and by a jury of that county ; the locality of the action fixed the *venue* (which is derived either from Fr. *venir* or Lat. *vicinetum*, neighbourhood), and in early times the jury were drawn from the actual hundred in which the cause of action arose, while transitory actions might be tried in any county. Local *venues* have, however, now been abolished for civil proceedings ; and the place and mode of trial of an action are now fixed by an order made by the Master in chambers on a summons for directions.

*Jurisdiction of the High Court.*—The High Court has jurisdiction over the whole of England and Wales, and may, as a rule, entertain any action on contract or tort, wherever the cause of action arose, and whether either or both of the parties to it are British subjects or not, or reside or carry on business in England or Wales or not. The principal limitations to its jurisdiction are that (i) no action can be brought in the High Court for the recovery of, or trespass to, land outside England or Wales (*British South Africa Co. v. Companhia de Moçambique* [1893] A. C. 602) ; but this rule does not prevent the High Court in the exercise of its equitable jurisdiction *in personam* from entertaining in a proper case an action for the specific performance of a contract of sale of land, or concerning a mortgage of land, situate outside the jurisdiction (*Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 444), and (ii) a practical limitation arises in the necessity of service of writs of summons and other documents ;

for no writ can be issued for service outside of England or Wales except by leave of a Judge, and leave can only be obtained in the cases specified in Order XI. (see also O. IX., r. 8A, and pp. 496-498 of this volume), and (iii) no action can be successfully brought in the High Court for a tort committed abroad, unless the act complained of was wrongful according to the law both of the place where it was committed and of England (*Mostyn v. Fabrigas* (1774) 1 Cowp. 161; 1 Smith's Leading Cases; *Machado v. Fontes* [1897] 2 Q. B. 231), and (iv) it may also be mentioned that the Court of the Chancellor of the University of Oxford, in the case of *Ginnett v. Whittingham* (1885) 16 Q. B. D. 761, established its claim to exclusive jurisdiction over an action for libel brought against a resident undergraduate member of the University, by a person resident in London and in no way connected with the University.

*Torts which are also crimes.*—The circumstances in which a right of action in tort is suspended until a prosecution for a felony has taken place, and in which a previous conviction or acquittal on a charge of assault may bar an action for the tort, have already been discussed (pp. 280-281).

*Transmission of interest or liability.*—The right to sue or the liability to be sued may be affected by death, bankruptcy, or by express assignment. .

*Death.*—On the death of one of the parties to a contract which has already been broken, the right to sue or the liability to be sued, which accrued at the date of the breach, generally passes on his death to his personal representatives, as we have seen (p. 78). Breach of promise of marriage forms an exception to this general rule; and the death of either party after breach discharges the right of action, with the possible exception of such part of the claim as may consist of special damage (*Quirk v. Thomas* [1916] 1 K. B. 516).

When at the time of the death of one of the contracting parties the contract is still executory, that is to say, the time for performance or complete performance has not arrived, the right or liability of the personal representatives to have the contract carried out depends on the nature of the contract. If the contract entered into by the deceased was of a purely personal nature, such as a contract to marry or to render personal services, the contract is extinguished by his death ; and his personal representatives cannot be required to perform it, nor can they demand performance of it by the surviving party. When the contract is not of a personal nature, but is, *e.g.*, a contract to pay money, the benefit of the contract passes, on the death of the creditor or promisee, to his representatives ; and, similarly, the duty to perform it passes, on the death of the debtor or promisor, to his representatives, as in the case first put.

The effect of death upon the right to sue, and the liability to be sued, in tort has already been discussed (pp. 294–298); and the effect of bankruptcy in these circumstances will be discussed in the later chapter on Proceedings in Bankruptcy (XXX.)

The circumstances in which the assignment of a right of action is permitted in equity or under the Judicature Act, 1873, s. 25 (6), have been referred to in the preceding volume (II., pp. 591–592).

### LIMITATION OF ACTIONS.

In contrast to the majority of criminal proceedings (see Vol. IV., p. 150), an action to enforce a civil claim must (with unimportant exceptions) be brought within a certain time after the accrual of a complete cause of action. That time, or rather those times (for there is a considerable diversity), are fixed by the Statutes of Limitation and certain other special

statutes. It will be convenient to consider, first, those which are applicable to the recovery of land ; second, those which are applicable to the recovery of money charged on land or secured by judgments, and of legacies ; third, that applicable to the recovery of money secured by specialty, and of the personal estate of an intestate ; fourth, those applicable to the recovery of simple contract debts and to certain other personal actions ; and, fifth, those applicable to trustees.

*I. The Statutes of Limitation as applicable to land.*

These are the Real Property Limitation Acts, 1833, 1837, and 1874, by force of which the law on the subject is now as follows. No action to recover any land or 'rent' (as therein defined and excluding rent reserved under a lease for years) can, in general, be brought (otherwise than by the Crown), more than twelve years after the time at which the right to bring the action first accrued to the person bringing the same (1874, s. 1). But if, when the right of any person first accrued, he was under the disability of infancy, or lunacy, then he, or the person claiming through him, may bring the action within six years next after the person to whom the right accrued shall have died, or ceased to be under disability (whichever of these events shall first happen), or within twelve years from the accrual of the right, whichever period shall be longest (1874, s. 3). No such action, however, may be brought, except within thirty years next after the right accrued ; even though the disability may have attached during the whole of the thirty years, or although the term of six years above mentioned has not expired (1874, s. 5).

*Time of accrual of right.*—The Acts provide that the right to bring the action shall be deemed to have first accrued as follows : in the case of a person who has



been in possession, on his dispossession ; in the case of an heir or devisee entitled to the possession, on the death of his testator or ancestor who has died in possession ; in the case of a grantee by deed of a present interest, on the execution of the deed ; in the case of remaindermen and reversioners, and persons entitled to other future estates, on their remainders, reversions, or other future estates falling into possession ; and, in the case of persons becoming entitled to possession by reason of any forfeiture or breach of condition, on the occurring of such forfeiture, or on the breach of such condition, or, if the estate claimed by the plaintiff is a remainder or reversion, at the time when it would have fallen into possession if there had been no such forfeiture or breach of condition (1833, ss. 3, 4).

But as regards all remainders, reversions, and future estates, expectant on a particular estate, the owner of which particular estate has been, and continues to be, dispossessed, the right of entry is wholly barred, either at the expiration of twelve years from the dispossession of the particular tenant, or at the expiration of six years from the determination of his estate, whichever period is the longer ; there being also provision for an allowance for disabilities as in the case of estates in possession, with the same extreme limit of thirty years (1874, s. 2). All titles created subsequently to such dispossession of the particular tenant, out of or in the remainders or reversions on his estate, are barred at the same time.

In the case of reversions on tenancies at will, the right of entry is deemed to accrue on the actual determination of the tenancy, or (at the latest) on the expiration of one year from the commencement of the tenancy ; in the case of reversions on tenancies from year to year or for any other period (not being by lease in writing), at the end of the first year or

other period, or (at the latest) on the last payment of rent; and, in the case of reversions on leases in writing (reserving twenty shillings or more of annual rent), on the expiration of the term, or, if the rent has been received adversely by a person wrongfully claiming the reversion, at the time when the rent was first so received, unless rent is subsequently paid to the rightful reversioner (1833, ss. 7, 8, 9).

*Tenancy in tail.*—As regards tenancies in tail, when the right of action of a tenant in tail is barred, all estates which he had power to bar are also barred; and when a tenant in tail dies before his right of action is barred, the right of action in respect of all estates which he had power to bar, is barred on the expiration of the period which would have barred the tenant in tail himself if he had so long lived (1833, ss. 21–22). Moreover, a person in possession under a base fee created by any tenant in tail, will acquire the fee simple absolute, if he continues in possession for twelve years from the time when such tenant in tail might, without the consent of any other person, have created a fee simple absolute (1874, s. 6).

*Effect upon proceedings in equity.*—A person claiming any land or rent in equity, must bring his action to recover the same within the period during which he might have brought an action for the recovery thereof, if his interest had been legal instead of equitable (1833, s. 24). In this respect equity follows the law. But, as regards land or rent vested in any trustee upon an express trust, when the land or rent has been conveyed to a purchaser for a valuable consideration, with notice of the trust, the right of the *cestui que trust* to sue the purchaser first accrues upon such conveyance (1833, s. 25) (as to the position of a *bonâ fide* purchaser of the legal estate for value *without* notice of any trust, see Vol. II., pp. 298, 300); and the right to sue the trustee himself will never be barred so long as he retains

the property which is the subject of the action, or the proceeds of it (Trustee Act, 1888, s. 8).

*Concealed fraud.*—As regards cases of concealed fraud, the right to sue accrues when the fraud was, or might with reasonable diligence have been, discovered by the person injured; but not so as to enable the owner of the land or rent to sue any *bonâ fide* purchaser who did not assist in the commission of the fraud, and who, at the time of his purchase, did not know, and had no reason to believe, that a fraud was being committed (1833, s. 26). The Acts do not, however, interfere with any rule of equity refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring the suit may not be barred by virtue of the statute (1833, s. 27).

*The barring of a mortgagor.*—As regards mortgaged estates, when the mortgagee has obtained possession, the mortgagor, or any person claiming through him, may not take proceedings to redeem the mortgage, except within twelve years next after the time at which the mortgagee obtained the possession, or from the last acknowledgment in writing which may have been given by the mortgagee of the mortgagor's title or his right of redemption, either to the mortgagor himself, or to some person claiming his estate, or to his agent. An acknowledgment given to one of several mortgagors is as good as if given to all; but one given by one of several mortgagees, having separate interests, only extends the time for redemption as regards his interest in the mortgage, while an acknowledgment given by one of several mortgagees jointly entitled has no effect (1874, s. 7).

§ *The barring of the mortgagee.*—When the mortgagor is in possession, a corresponding period is allowed to the mortgagee to recover the land, dating from the time when his right of action accrued (1833, s. 3; 1874, s. 1), or from the last acknowledgment in writing

of his title (1833, s. 14), or from the last payment of principal or interest (1837). In the case of a mortgage in ordinary form, the right of action accrues to the mortgagee, as regards ejectment, from the date of the mortgage, and, as regards foreclosure, from the time when the money becomes payable. The recovery of the money lent by action on the promise to repay is dealt with later (pp. 449–451). As between mortgagors and mortgagees, no extension of time is allowed for disabilities.

*Effect of the statutes on title.*—At the expiration of the period prescribed by these statutes for the bringing of an action to recover land, ‘rent,’ or advowsons, the title of the person against whom time has run is extinguished (1833, s. 34), and cannot be revived by subsequent re-entry or acknowledgement. But this extension does not always extend to personal remedies to recover the rent or money charged on the land (p. 449); and, in the case of possession by a mortgagor, a subsequent payment of interest will revive the title of the mortgagee (Act of 1837).

In this chapter we have been dealing with the destructive effect of the lapse of time in extinguishing titles; but it must not be forgotten that there is another very important aspect of the matter, namely, the effect of the lapse of time in enabling the *adverse possessor* to acquire a good title to the land by the fact of adverse possession for the statutory period. This aspect has already been discussed (Vol. II., pp. 272–277).

The effect of possession as regards land the title to which has been registered under the Land Transfer Act, 1897, has been dealt with elsewhere (Vol. II., pp. 477–478).

A suit for the recovery of land cannot be brought by the Crown after the lapse of *sixty* years (Crown Suits Acts, 1769 and 1861).



II. *The Statutes of Limitation as applicable to money charged on land or secured by judgments, and to legacies.*

An action to recover money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, must be brought within twelve years from the time when a present right to receive it has accrued to a person capable of giving a discharge, or from the last payment of principal or interest, or from the last written acknowledgment given by the person by whom the money is payable, or his agent, to the person entitled to it, or his agent (1874, ss. 1, 8). This provision bars after twelve years the personal remedy of a mortgagee against the mortgagor on the covenant under seal in the mortgage (*Sutton v. Sutton* (1883) 22 Ch. D. 511), and also the personal obligation under a covenant to pay a rent-charge. It also applies to all judgments, not merely to those which are a charge on land. An action to recover a legacy must also be brought within the same period of twelve years : even when it is payable out of personal estate only.

*Arrears only recoverable within six years.*—No arrears of rent, whether rent-charge or rent-service, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, are recoverable, except within six years after the same have become due, or been acknowledged to the person entitled thereto or his agent, in writing signed by the person by whom they were payable, or his agent (1833, s. 42). But, so long as the relation of landlord and tenant exists, it seems that a distress may be levied for six years' arrears of rent (one year's in the case of an agricultural holding). When rent due under a lease is secured by covenant, twenty years' arrears may be recovered in an action on the covenant (Civil Procedure Act, 1833, s. 3).

The existence of an express trust will not prevent

time running in the case of money or a legacy charged on land, of arrears of rent or of interest on any sum of money or legacy so charged (1874, s. 10) ; but in the case of a legacy not charged on land, an express trust may prevent the running of time (Trustee Act, 1888, s. 8 ; see p. 454).

III. *The Statutes of Limitation as applicable to money secured by specialty, to a recognisance, and to the personal estate of an intestate.*

An action on a contract under seal, technically called a 'specialty,' must be brought within twenty years from the cause of action arising, or from the date of the last payment on account of the principal or interest due under it, or from the last acknowledgment in writing signed by the party to be charged or his duly authorised agent (Civil Procedure Act, 1833, ss. 3, 5) ; but if the money is not only secured by specialty, but also charged on land, the Act of 1874, s. 1, cuts down the period to twelve years from the last payment (*Shaw v. Crompton* [1910] 2 K. B. 270). A proceeding on a recognisance must be brought within the same time. The law as to disabilities is the same as in the case of simple contract debts (pp. 451-452).

Actions to recover any share of the personal estate of an intestate in the possession of his legal representative, or of the Crown, must be brought within twenty years after a present right to receive the same first accrued (Law of Property Amendment Act, 1860 ; Intestates Estates Act, 1884, s. 3).

IV. *The Statutes of Limitation as applicable to simple contracts and certain personal actions.*

The principal statute is the Limitation Act, 1623. By the combined effect of that statute, of the Statute of Frauds Amendment Act, 1828, s. 1, and of the Mercantile Law Amendment Act, 1856, s. 13, an

action on a contract not under seal, technically called a 'simple contract,' must be brought within *six* years from the date of the breach, or from the date of the last payment on account of principal or interest due under it, or from the date of the last written acknowledgment, from which a promise to pay may be implied, or of the last written promise to pay, signed by the party to be charged or his duly authorised agent.

If a simple contract debt is secured on land, the personal remedy will be barred at the end of *six* years ; but the remedy against the land will not be barred till the end of *twelve* years.

The following actions must also be brought within *six* years from the date of the accrual of the right of action, viz. : actions for account or for not accounting (including merchants' accounts), or on the Case, or for arrears of rent not secured by covenant, actions for trespass to land or chattels, conversion, replevin, deceit, seduction, nuisance, malicious prosecution, libel, and slander actionable only on proof of special damage, and actions founded on negligence (Act of 1623, s. 3).

The following actions must be brought within *four* years of the happening of the cause of action, viz. : assault, battery, and false imprisonment (Act of 1623, s. 3).

The following actions must be brought within *two* years, viz. : slander actionable without proof of special damage (Act of 1623, s. 3), and actions on penal statutes, where the penalty is given to the party grieved.

*Disabilities.*—As regards actions to which the Limitation Act, 1623, relates, if the person entitled to sue is, at the date when the right of action accrues, an infant or a lunatic, the period within which he may bring the action commences to run from the date on which the disability ceases ; and, by the statute 4 & 5

Anne (1705) c. 16, if at the date of the accrual of the cause of action the person liable to be sued is absent 'beyond the seas' (as defined by the Mercantile Law Amendment Act, 1856, s. 12), the period does not begin to run against the plaintiff until the return of the person absent beyond seas. But absence beyond seas is no longer a disability entitling a *claimant* to any extension of time; and, once the statute begins to run, it continues to run, notwithstanding any subsequent disability arising by reason of the plaintiff's lunacy, or the defendant's absence beyond the seas.

*Concealed fraud.*—The equitable rule which prevents time from running, when the cause of action has been concealed by the defendant's fraud, until such time as the cause of action is or ought to have been discovered, has no application to the ordinary common law action for breach of contract (*Osgood v. Sunderland* (1914) 30 T. L. R. 530). It may, however, apply to actions for specific performance, or other equitable remedies.

Actions under the Fatal Accidents Act, 1846, in respect of fatal accidents, must be brought within one year after the death of the deceased; and actions for compensation, under the Employers' Liability Act, 1880, within six months from the accident causing injury, or twelve months from the death, and claims under the Workmen's Compensation Act, 1906, within six months from the accident or death.

Actions *by* personal representatives for injury to the *real* property of their deceased must be brought within one year from his death; and actions *against* personal representatives for injuries done by their deceased to the *real or personal* property of another within six months after they have taken upon themselves the administration of his estate (Civil Procedure Act, 1833, s. 2). Actions against public authorities or public officers, for any tortious act or default in the



execution of their public or statutory duties, must be brought within six months of the occurrence of the act or omission complained of (Public Authorities Protection Act, 1893)—a very important provision which cuts down (in the cases to which it applies) the longer periods of limitation fixed by earlier statutes.

There appears to be no statute limiting the time within which an action to redeem or foreclose a mortgage of pure personalty must be brought. But if realty and personalty are comprised in one mortgage, and the right of the mortgagor is barred as regards the realty, he will not be allowed to redeem the personalty (*Charter v. Watson* [1899] 1 Ch. 175).

*Different effects of limitation upon realty and personalty.*—There is an important distinction to be observed between the law of limitation as affecting realty and that affecting personalty; namely, that the Real Property Limitation Acts have the effect of extinguishing the right or title of the party in delay, as well as of barring his remedies by action, entry, or distress, while the Limitation Act, 1623, and the Civil Procedure Act, 1833, bar the remedies by action and set-off only, and do not extinguish the right. So that, though a creditor cannot bring an action to recover his debt after the expiration of the limited period, there is nothing to prevent him from obtaining payment of it after that period in any other manner; for example, by the appropriation of an unappropriated payment made by the debtor to him, or by the exercise of any lien that he may hold on the property of the debtor, or, if he is the debtor's executor, by virtue of his right of retainer. But he may not set off a debt, the remedy for which is statute-barréd at the time of the commencement of the action. As to personal chattels, the cause of action in Detinue and in certain kinds of Conversion is not complete until there has been a demand for the goods by the plaintiff and a

refusal to give them up ; and there are circumstances in which, even after the right to recover personal chattels by action is barred, the person entitled to them may be able to retake them peaceably.

V. *The Statutes of Limitation as applicable to trustees.*

By the Trustee Act, 1888, s. 8, in the case of express trusts, if the trustee retains property, or has converted it to his use, or has been guilty of fraud, there is no limitation of the time within which an action may be brought against him to recover it ; in other cases, however, an action against a trustee must be brought within the time within which it would have to be brought if no trust existed. If the action is to recover money or other property, and there is no statute which applies (for example, in the case of an action for breach of trust), the action must be brought within six years from the time when the cause of action arose (*Re Somerset* [1894] 1 Ch. 231). In the case of a breach of trust, time runs from the breach, not from the time when consequent loss occurred. Time does not, however, begin to run against a beneficiary until his interest is in possession.

In the case of money, including a legacy charged on land, or arrears of interest on money so charged, or arrears of rent, the mere existence of an express trust does not prevent time running in favour of the defendant not being an express trustee (Real Property Limitation Act, 1874, s. 10).

It may be convenient, after this explanation, to summarise in tabular form the prescribed times for bringing actions and claims, with, however, the warning that, in a matter so intricate as the limitation of actions, any summary can only be regarded as a *primâ facie* guide, and the relevant statutory provisions must be carefully studied.

## I.—AS REGARDS LAND.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
Action at law or in equity to recover the possession of land :—	
(1) In general . . . . .	twelve years, from accrual of right to the possession.
(2) Where any disability at time of right to possession accruing ;	in addition to the twelve years, six years, from termination of disability, provided thirty years in all from time the right to the possession accrued be not exceeded.
(3) Where tenant for life has been dispossessed, and has continued dispossessed till his death, remainderman must sue ;	within twelve years from the tenant for life's dispossession, or within six years from his death.
(4) Where tenant in tail has been dispossessed, and has continued dispossessed till his death, remainderman must sue ;	within twelve years from the tenant in tail's dispossession.
(5) Where the person in possession is a tenant at will, lessor must sue ;	within twelve years from the determination of the tenancy or from the end of the first year of the tenancy.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(6) Where the person in possession is a tenant from year to year under an oral agreement, . lessor must sue ;	within twelve years from the end of the first year of the tenancy, or from the last payment of rent, whichever shall last happen.
(7) Where a lessee under a lease in writing at an annual rent of 20 <i>s.</i> or more has paid rent to an adverse claimant, the person rightfully entitled must sue ;	within twelve years from the first adverse payment of the rent, unless rent is subsequently paid to the person rightfully entitled.
(8) Where an ordinary lessee at a rent has not paid rent to any one, the lessor must sue ;	within twelve years from the end of the lease.
(9) Where a trustee has wrongfully sold to a purchaser with notice ;	within twelve years from the sale.
(10) Where there has been a fraudulent dispossession;	within twelve years from the discovery of the fraud.
(11) Where the mortgagor is the plaintiff ;	within twelve years from the taking of possession by the mortgagee, or last acknowledgment.
(12) Where the mortgagee is the plaintiff ;	within twelve years from the right of action accruing to



CHARACTER OF  
ACTION.TIME FOR  
COMMENCING ACTION.

- |  |   |
|--|---|
|  | the mortgagee, or<br>from the last pay-<br>ment of principal<br>or interest.  |
| (13) Action to recover land or<br>rent by spiritual or<br>eleemosynary corpora-<br>tion sole ; | within sixty years,<br>or two incumben-<br>cies and six years,<br>whichever is the<br>longer.                                     |
| (14) Action to recover advow-<br>sons and the like ;   | within three incum-<br>bencies or sixty<br>years, whichever is<br>the longer ; or, in<br>some cases, within<br>one hundred years. |
| (15) Proceedings by the Crown<br>to recover land ;   | within sixty years,<br>as a rule.   |

## II.—AS REGARDS MONEY CHARGED ON LAND, ETC.

CHARACTER OF  
ACTION.TIME FOR  
COMMENCING ACTION.

- |  |   |
|--|---|
| (1) Action to recover money<br>charged on land (by<br>mortgage, lien, or other-<br>wise), or secured by a<br>judgment, or any legacy ; | within twelve years<br>after the right to<br>receive the money<br>or legacy has<br>accrued. |
| (2) Action to recover arrears of<br>rent or of interest on any<br>money or legacy secured<br>on land ;                                 | six years' arrears<br>only recoverable.   |

## III.—AS REGARDS SPECIALTY DEBTS AND INTESTACIES.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action of debt on specialty contract (including rent under an indenture of lease and debts on recognizances) :	
(A) in general ;	within twenty years ;
(B) when included in a mortgage of land ;	within twelve years.
(2) Action to recover personal estate of an intestate.	within twenty years after right to receive the same accrued.

## IV.—AS REGARDS SIMPLE CONTRACT DEBTS AND CERTAIN OTHER PERSONAL ACTIONS.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action on simple contract, or for rent on parol letting ;	within six years.
(2) Action of account or on the Case generally ;	within six years.
(3) Action for money payable under an award, when the submission is not under seal ;	within six years.
(4) Action for copyhold fine ;	within six years.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(5) Action of Detinue, Trover, or Conversion ;	within six years.
(6) Action of Replevin ;	within six years.
(7) Action of Trespass to land or chattels ;	within six years.
(8) Action of Trespass to the person (including assault, battery, and false imprisonment) ;	within four years.
(9) Action for libel and ordinary slander ;	within six years.
(10) Action for slander actionable without proof of special damage ;	within two years.
(11) Actions on penal statutes ;	within two years in most cases.
(12) Actions against public authorities or public officers generally ;	within six months.
(13) Claims for compensation for workmen ;	within six months in most cases.
(14) Action by personal representatives for injury to real estates ;	within one year from death.
(15) Action against personal representatives for injury to real or personal property done by deceased ;	within six months from death.

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## V.—AS REGARDS ACTIONS AGAINST TRUSTEES.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action against trustee where he retains the property or has converted it to his use, or has been guilty of fraud ;	no limitation of time.
(2) Action against trustee in any other case ;	the same period as in actions against other people, or, if no statute is applicable, six years.

## NOTE ON AUTHORITIES.

[Reference should be made to the *Real Property Limitation Acts*, 1833, 1837, and 1874, and to the *Limitation Act*, 1623, and the *Civil Procedure Act*, 1833. The law will be found succinctly stated in the "*Digest of English Civil Law*," pp. 72-81. See also Jenks, "*Modern Land Law*," chap. XIV.]



## CHAPTER XXVI.

THE COURTS IN GENERAL, AND IN PARTICULAR THE  
SUPERIOR COURTS.

THE bringing of an action necessarily implies a court or tribunal before, or in, which it is brought. Our next duty will, therefore, be to give some account of the tribunals established in this country. But, before doing so, we may say a few words about courts in general.

*Definition of a 'court.'*—A court is defined to be a place wherein justice is judicially administered. All courts of justice in England are now derived, mediately or immediately, from the power of the Crown; and in all courts, the King, as the fountain of justice, is supposed, in contemplation of law, to be always present, being represented by his Judges, whose power is only an emanation from his royal prerogative. Justice is administered by a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. But first we shall mention one distinction that runs through them all; viz. that some are courts of record, and others not of record.

*Courts of record.*—Courts are either courts of record or courts not of record. A *court of record* is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are

called the records of the court. And these records are of such high authority, that their truth is not to be called in question. And if the existence of a record be denied, it is tried by nothing but itself, that is, upon bare inspection whether there be any such record or not ; else there would be no end of disputes. But this rule does not prevent the judge from inquiring, *e.g.*, whether the record (in the case of a judgment debt) was based on no consideration, a matter which is often very material in bankruptcy ; also, if there appear any mistake of any officer of the court in making up the record, the judge will direct him to amend it. And in general, all slips in legal proceedings (including records) may be amended by an order of the court, to be obtained in a summary way (Rules of Supreme Court, O. XXVIII., r. 11).

All courts of record are the courts of the King, in right of his crown and royal dignity ; and they comprise both superior and inferior courts (*e.g.*, county courts). No court not of record has authority to fine and imprison for contempt of its authority. So that the very erection of a new jurisdiction with the power of fine or imprisonment for contempt, makes it a court of record ; and, indeed, the possession of the power to commit for contempt may be regarded as the true test of the question whether a court is one of record or not. But in some courts of record, *e.g.*, in county courts, this power is limited to contempts committed *in facie curiæ* ; that is to say, to wilful insults to the judge, or to any juror or witness, registrar or other officer of the court, during his attendance in court, or in going to or returning from the court, and to wilful interruptions of the business of the court, and to wilful misbehaviour in court. On the other hand, the superior courts of record have a far greater jurisdiction in contempt of court, *e.g.*, any person who publishes, no matter where, any matter likely to

prejudice the just course of proceedings before them, may be fined and imprisoned for contempt.

*Courts not of record*, on the other hand, are courts of inferior dignity ; and these are not, as a general rule, intrusted by the law with any power to fine or imprison for contempt.

In modern times many proceedings are *ex parte*, *e.g.*, in the case of guardianship and the custody of infants ; and there may often be no defendant or respondent. But, as a general rule, in every civil judicial proceeding there must be at least three elements, viz. (i) the plaintiff, petitioner, or claimant, who complains of an injury done ; (ii) the defendant or respondent, who is called upon to answer or make satisfaction for it ; and (iii) the judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. Some account has already been given of the duties of counsel and solicitors and of the organisation of the two branches of the legal profession to which they respectively belong (Vol. I., Chap. XXIX.).

*Sitting in camerâ*.—"The broad principle is, that "the courts of this country must, as between parties, "administer justice in public" (*per* Viscount Haldane, L.C., in *Scott v. Scott* [1913] A. C. at p. 437). There are, however, exceptions in which this fundamental principle gives way to the paramount duty of securing that justice is done ; and, where it can only be done by a Court sitting *in camerâ*, this course will be followed. The principal exceptions in practice are : (i) decision of questions affecting wards and lunatics, where the jurisdiction of the Court is 'parental and administrative' rather than contentious ; (ii) "litigation as to a secret process, where the effect of "publicity would be to destroy the subject-matter" ;

(iii) any other case in which the presence of the public would make the administration of justice impracticable. The mere fact that the evidence is likely to be unsavoury does not justify a sitting *in camerá* ; but, of course, an Act of Parliament may direct or empower a court to try cases of a particular character in private (*e.g.*, Punishment of Incest Act, 1908, s. 5).

*Superior and inferior courts.*—Some courts are of an inferior or limited jurisdiction, while others are of a superior and universal authority. This is an important distinction ; inasmuch as an action brought in any of the former class is always liable to a plea of want of jurisdiction, while no such plea can (with rare exceptions, see pp. 441–442) be urged in a superior court. Moreover, the superior courts have a coercive or restraining jurisdiction over the inferior ; not merely by way of *appeal*, but by way of *prohibition* to forbid further proceedings in any matter beyond the jurisdiction of the inferior courts, or by way of *certiorari* to remove the proceedings from the inferior to a superior court. We shall, accordingly, deal in this and the following chapters, first with courts of superior or unlimited jurisdiction, then with courts of inferior or limited jurisdiction, and, finally, with those special prerogative writs by which the coercive or restraining influence above alluded to is exercised. The superior courts are, the Supreme Court of Judicature, the Court of Criminal Appeal, the Chancery Courts of the Counties Palatine of Durham and Lancaster, the House of Lords, and (though, as we shall see, almost entirely concerned with appeals from the King's Dominions beyond the seas) the Judicial Committee of the Privy Council. All other courts are inferior courts, *e.g.*, the county courts, and the numerous Borough and other local courts.



## THE SUPREME COURT OF JUDICATURE.

The existing superior courts of Common Law and Equity owe their existence and organisation to the changes introduced by the Judicature Acts of 1873 and 1875, which came into operation on the 1st November, 1875, and to the various statutory amendments of those Acts which have since been adopted (The Judicature Acts and kindred enactments will be found in a convenient form in Vol. II. of the *Yearly Practice*). Various Orders and Rules of practice have also been made from time to time under the Judicature Acts and the Rules Publication Act, 1893, by the 'Rule Committee,' a body comprising certain judges and two practising barristers and two practising solicitors. But, inasmuch as the Judicature Acts in substance only rearranged and incorporated the superior courts existing at the time when they took effect, it will be advisable to commence with a very brief account of the old superior courts of Common Law and Equity, which (with the exception of the Chancery Courts of the Counties Palatine of Durham and Lancaster) have been consolidated into the Supreme Court of Judicature.

I. *The Court of King's Bench*.—It would lie outside the scope of this book to give an account of the *Curia Regis* of the Norman and Angevin Kings, or of the many meanings of that term, or of the way in which, from that body, were formed the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer; but a few words must be said concerning these three courts.

The Court of King's Bench was so called because the King used originally to sit there in person, whence the style of the court was *coram rege*; and after he had ceased to do so, he was deemed to be actually present.

Originally, therefore, this court did not sit in any fixed place, but followed the King's person wherever he went. For which purpose all process which issued out of this court in the King's name was originally made returnable '*ubicunque fuerimus in Angliá.*'

The jurisdiction of this court was very high and transcendent. It kept all inferior jurisdictions within the bounds of their authority, and might either remove their proceedings to be determined before it, or prohibit their further progress below. It superintended all civil corporations in the kingdom. It commanded magistrates and others to do what their duty required, in every case where there was no other specific remedy. It protected the liberty of the subject by a speedy and summary interposition (see Chapter XXXI., on the Prerogative Writs, pp. 665–674). It took cognizance of both criminal and civil causes; the former on what was called the Crown side, and the latter on the Plea side of the court. The jurisdiction on the Crown side of the court will be considered hereafter (Vol. IV., pp. 228–232); but, on its Plea side, the court exercised at the coming into operation of the Judicature Acts a general jurisdiction and cognizance of all actions between subject and subject; excepting only matters affecting the revenue of the Crown, which were assigned to the Court of Exchequer, and excepting also real actions, which (until their abolition in 1833) were within the exclusive jurisdiction of the Court of Common Pleas. This general jurisdiction was originally acquired by means of a legal fiction, to the effect that the defendant had committed a breach of the peace in the county of Middlesex and was on that account in the custody of the marshal and so subject to the jurisdiction of the court.

II. *The Court of Common Pleas (otherwise called the Court of Common Bench).*—This court probably owed

its existence as a permanent tribunal to a purely administrative arrangement made in the reign of Henry the Second. But its name and peculiar prominence date from *Magna Carta*, which provided that *common pleas* should no longer follow the King's *curia*, but be heard in some fixed place, ultimately fixed at Westminster, instead of wherever the King might happen to be. It had exclusive jurisdiction in all real actions until they were abolished, and had acquired, also by means of fictions, concurrent jurisdiction with the two other courts of Common Law in all personal actions between subject and subject.

III. *The Court of Exchequer*.—This court had exclusive jurisdiction in revenue cases, and in actions to recover debts, duties, or taxes due to the Crown. By procedure based on a legal fiction to the effect that the plaintiff was less able (*quo minus*) to pay the King his debt or rent because the defendant had done the plaintiff some injury, or refused to pay him his due, it afterwards acquired a concurrent jurisdiction in personal actions between subject and subject, without, however, losing its exclusive jurisdiction in revenue cases. It was, in fact, originally a department of the royal exchequer; which, in addition to its principal and administrative business of receiving and issuing the King's revenue, undertook incidentally to settle legal questions arising in the course of its revenue proceedings, and thus developed a 'Plea side.' This peculiar origin of the court was marked by the fact that its judges were entitled *barones* (or 'liege men'), simply; not *justitiiarii* (or 'judges'). Before 1841 it had acquired and was exercising a general equitable jurisdiction, which in that year was transferred to the Court of Chancery. It also did a good deal of business in suits for the recovery of tithes, until tithes were gradually extinguished in the nineteenth century (Vol. I., pp. 351–353).

IV. *The Court of Exchequer Chamber*.—This was a Court of Appeal, originally from the Court of Exchequer, and later from any of the three above-mentioned superior courts of Common Law. It consisted of the common law judges other than those from whose court the appeal by proceedings in error was brought. From the Exchequer Chamber an appeal lay to the House of Lords.

V. *The Court of Chancery*.—This court is said to have taken its name from the Chancellor who presided over it. Originally his duties were ministerial, not judicial. He was head of the writ office or chancery, out of which were issued in the King's name the original writs used in the courts of Common Law; and, in 1285, he was authorised by the Statute of Westminster the Second, to vary the forms of writ then in use, so that justice might be done in the common law courts in cases which did not fall precisely within the original forms of writs. It was to the exercise of this power that the courts of Common Law owed the form of personal action known as 'Trespass on the Case,' which enabled them to entertain a wide class of claims not falling within any other recognised form of action (p. 326, and Vol. I., pp. 53–54).

Notwithstanding, however, the power given for devising new forms of action, the courts of Common Law, owing to the technicality of their procedure, the strict regard to precedent, and their inability or unwillingness to adapt themselves to changing conditions, were not always able to grant any remedy, or any effective remedy, in cases where natural justice demanded that relief should be given. In these circumstances, the only course open to the person aggrieved was to appeal to the King, the fountain of justice, to exercise the royal prerogative in his behalf. As petitions for such extraordinary relief became



more common, they were referred to the Chancellor for consideration, in virtue of his leading position in the King's Council, and his office of 'guardian of the King's conscience.' For, until the sixteenth century, the Chancellor was generally an ecclesiastic, and, until the end of the seventeenth, a statesman, rarely a lawyer; and his natural sympathy towards conveyances to Uses (Vol. II., pp. 151–153), which were originally devised to benefit the Church, probably gave the start to his judicial activity. In course of time, the court of the Chancellor came to be recognised as a tribunal distinct from that of the King's Council; and, as the work of the court increased, the Chancellor was, from 1730 onwards, assisted in his judicial functions by the Master of the Rolls, who had been the chief official in the writ office of the Chancery. In 1813, a Vice-Chancellor was appointed, owing to the increasing arrears of causes in the court; and in 1842, when the Equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, two additional Vice-Chancellors were appointed. Such was the constitution of the court before the Judicature Acts came into operation.

Some account of the general nature of Equity and of its leading principles and of the peculiar characteristics of Equity jurisdiction has already been given in Section IV. of the Introduction (Vol. I., pp. 51–75); but it may be useful to give here a short summary of the broad distinctions between the Court of Chancery and the courts of Common Law, in order to show what were the effects of the Judicature Acts. First, as regards the law administered, the courts of Common Law applied the principles of the Common Law, which were supposed to have been established from time immemorial; whereas the Court of Chancery was a court of conscience, applying rules of Equity. These rules were naturally vague at first, and did not

begin to become fixed or systematised till towards the end of the seventeenth century ; and many of them were subsequently invented or developed by different Chancellors from time to time (*per* Jessel, M.R., *Re Hallett's Estate* (1879) 13 Ch. D. at p. 710). Examples of these purely modern doctrines are : the rules as to married women's separate estate, especially as to restraint on alienation, the Rule against Perpetuities, and the rules of equitable waste.

Second, as regards the relief granted, the courts of Common Law could put a person entitled to land in possession of it by a writ of possession directed to the sheriff, and in actions of tort or on contract could award damages or order the payment of a debt, and enforce the judgment by execution against the property of the defendant ; but they could not grant an injunction before 1854, nor specific performance at any time. The Court of Chancery, on the other hand, could not award damages before 1858 ; but it could compel a person by decree of specific performance to carry out his contract, or by injunction restrain a threatened breach of contract or the commission of a tort, or make such other order as the justice of the case required, and could enforce obedience to its order by arresting and imprisoning the disobedient party until he purged his contempt of the court's authority by obeying its order. Thus, the Court of Chancery was able to forbid a person to assert his legal rights in a court of Common Law, or to compel him to use them for the benefit of another person. In this way it was able, amongst other things, to create a new system of ownership of land ; by compelling the legal owner to use his legal rights for the benefit of the person entitled to the enjoyment of the land in equity.

Third, as regards the kind of business transacted. The business of the courts of Common Law was almost purely litigious, involving the determination of dis-

puted questions of fact or law. Whereas the business of the Court of Chancery was largely administrative ; consisting, as it did, of the execution of trusts, the distribution of the assets of a deceased person, the redemption or foreclosure of mortgages, the sale of property subject to a lien or charge, the wardship and maintenance of infants, the raising of portions or charges on land, the protection of the property of married women, and the taking of accounts.

Fourth, as regards procedure, actions at law were usually commenced by writ of summons, demanding relief as of right ; suits in equity by bill or petition praying for relief, and for the summons of the defendant by *subpœna* to appear and answer the complaint made against him. Evidence in a common law action was given *vivâ voce* in court ; but the parties to the action, and others interested in the result of the proceedings, were not allowed to give evidence until 1851. In a Chancery suit, on the other hand, the evidence was usually given by written answers on oath to interrogatories, or by affidavit ; and the parties were competent witnesses. In a common law action, discovery of documents was not allowed ; and, though the court could order an account to be taken, the proceedings on a writ of account were so clumsy and ineffectual, that the process early fell into disuse. On the other hand, the discovery of documents and the taking of accounts were part of the ordinary work of Chancery ; and proceedings in Chancery to obtain discovery of documents in possession of an opponent, or to have an account taken, or to rectify a written document on the ground of mistake, were sometimes even necessary as auxiliary to an action at law. In a court of Common Law, questions of fact were usually decided by a jury ; in the Court of Chancery by a Judge. Proceedings in an action at Common Law were more speedy than those in Chancery. Delays

in Chancery suits were aggravated by a system of rehearings and appeals ; for almost any point arising in the course of a suit might be discussed before the Master of the Rolls or a Vice-Chancellor originally, and a second time by way of rehearing, and again before the Lord Chancellor by way of appeal, and a second time by way of rehearing. After 1851, a court of intermediate appeal, consisting of the Lord Chancellor and two Lords Justices in Chancery, was created ; and from that court an appeal lay to the House of Lords.

VI. *The High Court of Admiralty*.—This tribunal was originally the court of the Lord High Admiral, who had jurisdiction, exercised by his deputy, in maritime causes arising on the high seas, and not within the jurisdiction of the courts of Common Law. The criminal jurisdiction of the Admiral to punish piracy, or other crimes committed on the high seas, was taken away in 1536 ; and, after the restoration of Charles the Second, the maritime jurisdiction of the court in civil cases was considerably curtailed by writs of prohibition issued out of the Court of King's Bench. During the Napoleonic wars, the court exercised an important jurisdiction in prize cases ; and the great reputation of Lord Stowell, who was appointed judge in 1798, attracted public attention to the court. As the result of the report of a commission appointed to inquire into the office and duties of the judge of the court, the Admiralty Court Act of 1840 was passed, which re-constituted the High Court of Admiralty, and defined and extended its jurisdiction. The jurisdiction of the court was afterwards still further extended by the Admiralty Court Act, 1861, and the Merchant Shipping Acts. The jurisdiction could be exercised by proceedings *in rem*, by warrant for the arrest of the ship to which the claim related ; and this



was the peculiar and distinctive feature of Admiralty jurisdiction (pp. 620–627). An appeal from the Court of Admiralty lay to the Judicial Committee of the Privy Council.

VII. and VIII. *The Courts of Probate and of Divorce and Matrimonial Causes*.—These were two purely statutory tribunals created in 1858 to deal with testamentary and matrimonial business respectively, which, before that time, had been dealt with by the ecclesiastical courts, chiefly those of the bishops (Vol. II., pp. 613–615). All that need be said about them in this work will appear when we deal with probate and divorce procedure respectively (Chap. XXIX.).

IX. *The London Court of Bankruptcy*.—This also was a purely statutory tribunal, under a Chief Judge, created by the Bankruptcy Act, 1869, to deal with bankruptcy business. Provision was made by the Judicature Act, 1873, for the transfer of its jurisdiction, like those of the other courts enumerated above, to the High Court of Justice ; but, before the latter Act came into operation, this clause of it was repealed, and the London Court of Bankruptcy did not, in fact, merge into the King's Bench Division until 1st of January, 1884. The Bankruptcy business of the High Court was assigned in 1921 to the Chancery Division.

X. *The Palatine Courts*.—In the counties palatine of Lancaster and Durham, there were, at the date of the Judicature Acts, important courts of justice. These were the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham ; and also courts of equity, called the Lancaster Chancery Court and the Palatine Court of Durham, which were held before the respective chancellors of those counties palatine, or before judges specially commissioned for that purpose. Their equity jurisdiction (unless appellate) was not

affected by the Judicature Acts ; and, though clearly differentiated from the Court of Chancery by the fact that they exercise only local jurisdiction, they are not limited in their jurisdiction by any considerations of importance or value of the subject-matter of a case, and are, therefore, courts of superior jurisdiction.

XI. *The Assize Courts*.—These were held from antient times by Judges of the courts of Common Law who were sent by special commission from the Crown, on *circuits* all over the kingdom except into Middlesex, to try civil and criminal cases.

The commissions or authorities which were applicable to civil cases were, the commissions of *assize* and the statutory authority of *nisi prius* ; and those applicable to criminal cases were, the commissions of *oyer and terminer* and of *gaol delivery* and of the peace. With regard to the authority of *nisi prius*, it may be explained that all questions of fact arising in the King's courts had originally to be tried at Westminster, by a jury returned from the county in which the cause of action arose, ' unless sooner ' (*nisi prius*) the Judges of assize came into the county in question. But, by the effect of the Common Law Procedure Act, 1852, the trial of civil cases was allowed to take place, as a matter of course, before the judges of assize. And even matrimonial causes will, in a short time, so be tried (Administration of Justice Act, 1920, s. 1).

*The Supreme Court of Judicature*.—We shall now consider the operation and effects of the Judicature Acts, 1873 and 1875, which, as we have said, came into operation on the 1st of November, 1875. In the first place, they created and constituted a new court, called the Supreme Court of Judicature, consisting of the High Court of Justice and the Court of Appeal.

(i) *The High Court of Justice*.—To the High Court of Justice was transferred all the jurisdiction which

in 1875 was capable of being exercised by (1) the High Court of Chancery, (2) the Court of King's Bench, (3) the Court of Common Pleas at Westminster, (4) the Court of Exchequer, (5) the High Court of Admiralty, (6) the Court of Probate, (7) the Court for Divorce and Matrimonial Causes, (8) the Court of Common Pleas at Lancaster, (9) the Court of Pleas at Durham, and (10) the courts created by commissions of assize, of *oyer and terminer*, and of *gaol delivery*.

For the more convenient distribution of business, the High Court was, however, organised in five divisions, namely, the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division; and to each division was assigned, speaking generally, the class of business which before 1875 was within the special or exclusive cognizance of the court or courts from which the particular division took its name. The business which was common to all the common law courts was (by inference) left to be dealt with indifferently by the Queen's Bench, the Common Pleas, or the Exchequer Divisions. At the end of 1880, the Queen's Bench, Common Pleas, and Exchequer Divisions were united into one division then called the Queen's Bench Division, and now the King's Bench Division; and in 1884 the bankruptcy business of the London Court of Bankruptcy was, as we have said, assigned to that division under the provisions of the Bankruptcy Act, 1883, whence, in 1921, it was transferred to the Chancery Division.

The Judges of the High Court consist of the Lord Chancellor, who is President of the Chancery Division, the Lord Chief Justice, who is President of the King's Bench Division, the President of the Probate, Divorce, and Admiralty Division, and (at present) twenty-four other Judges, who are styled 'Justices of the High Court'; of whom six sit in the Chancery Division,

seventeen in the King's Bench Division, and one in the Probate, Divorce, and Admiralty Division. Subject to a few exceptions, all the Judges of the High Court have equal power and jurisdiction, and may legally sit in any division; while the Lord Chancellor has power to request any person who has been a Judge of the High Court or of the Court of Appeal to sit and act as a Judge either of the Court of Appeal or of the High Court.

The High Court has both original and appellate jurisdiction. Actions commenced in or transferred from a county court or other inferior court to the High Court are tried before a Judge alone, if they are tried in the Chancery Division; or by a Judge alone or with a jury in the King's Bench Division or on the Probate or Divorce sides of the Probate, Divorce, and Admiralty Division, or by a Judge assisted in certain cases by nautical assessors, if tried on the Admiralty side of the last-named division. The Judicature Act, 1873, s. 56, contains a general power to try cases by a judge with assessors; but except in Admiralty matters this is seldom, if ever, done. The plaintiff may, within certain limitations, bring his action in any division he chooses. If he brings in one division an action assigned by the Judicature Acts to another division, the Judge has power either to retain it, or to transfer it to the division in which it ought to have been commenced, and where it can be more conveniently dealt with. But it is one of the essential principles of the Judicature Acts, that all divisions of the High Court are competent to conduct all kinds of business; and, therefore, the Judge ought not to dismiss any for want of jurisdiction.

The interlocutory proceedings in an action, that is to say, the various proceedings on summonses which take place between the issue of the writ and the trial, are, as we shall hereafter see (pp. 500-501),



generally conducted in chambers ; usually before a Master or Registrar, but sometimes before a Judge. In the King's Bench Division a Master, and in the Probate, Divorce, and Admiralty Division a Registrar, may, subject to a few exceptions, transact all such business and exercise all such jurisdiction as may, under the Judicature Acts and the Rules, be transacted or exercised by a Judge in chambers ; but from his exercise of such jurisdiction an appeal usually lies to the Judge in chambers. In the Chancery Division, the Master represents the Judge ; and most interlocutory applications are made to him in the first instance. But any party to such application is entitled to take the matter before the Judge himself, by way of adjournment, not of appeal.

An important part of the jurisdiction of the High Court is exercised by divisional courts, consisting of two or more Judges sitting together. The Divisional Court of the King's Bench Division exercises both original and appellate jurisdiction (Rules of Supreme Court, O. LIX.). For example, it has jurisdiction on motion to order a person to be attached or committed for contempt, or to order the issue of writs of *certiorari*, *quo warranto*, *prohibition*, or *habeas corpus* (Chap. XXXI.) ; it determines questions of law on cases stated by Quarter or Petty Sessions, and hears appeals from a county court or other inferior court, appeals in proceedings relating to election petitions, parliamentary or municipal, and certain appeals from a Judge in chambers (other than in matters of practice and procedure, in which cases an appeal, where allowable, goes direct to the Court of Appeal). The divisional court of the Probate, Divorce, and Admiralty Division hears appeals from separation or protection orders made by courts of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, or under the Licensing Act, 1902, where the husband

or wife is an habitual drunkard, and admiralty appeals from a county court exercising admiralty jurisdiction, and from the Liverpool Court of Passage, and from a Wreck Commissioner's report to the Board of Trade cancelling or suspending the certificate of the master, engineer, or mate of a ship for misconduct. The judgment of the Divisional Court of either division upon an appeal from an inferior court is final, unless leave to appeal to the Court of Appeal is given by the Divisional Court or by the Court of Appeal; excepting that, when the judgment of a county court in an admiralty case is 'altered' by the Divisional Court of the Probate, Divorce, and Admiralty Division, an appeal lies without leave to the Court of Appeal.

(ii) *The Court of Appeal*.—To the other branch of the Supreme Court of Judicature, viz. the Court of Appeal, was transferred, by the Judicature Act, 1873, all the appellate jurisdiction of (1) the Lord Chancellor and the Court of Appeal in Chancery, (2) the Court of Exchequer Chamber, (3) the Judicial Committee of the Privy Council in appeals from the High Court of Admiralty, and in lunacy appeals from the Lord Chancellor, (4) the Court of Appeal in Chancery of the county palatine of Lancaster, and (5), by the Judicature Act, 1881, s. 9, the Full Court for Divorce and Matrimonial Causes. The Court of Appeal consists of certain *ex-officio* judges, namely, the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Probate, Divorce, and Admiralty Division, and every person who has held the office of Lord High Chancellor, and of five ordinary judges, who are styled 'Lords Justices of Appeal.' But any Judge of the High Court may, if so required by the Lord Chancellor, also sit as a Judge of the Court of Appeal; and any Lord of Appeal in Ordinary who, at the time of appointment as such, was either a member of the Court of Appeal or qualified to be a

member, may, if he consents, upon the request of the Lord Chancellor, to do so, sit and act as a Judge of the Court of Appeal.

The Court of Appeal has, in general, jurisdiction to hear and determine an appeal from (1) any judgment or order of a Divisional Court, provided, in cases where the Divisional Court has itself acted as an appellate tribunal, that leave to appeal has been given by the Divisional Court or the Court of Appeal (except in the case above mentioned of a county court judgment in an admiralty case which is altered by the Divisional Court); (2) any final judgment or order of the High Court; (3) any interlocutory order of a Judge in chambers in matters of practice and procedure, subject, in most cases, to leave to appeal being given; (4) any decision or order of a county court judge on a question of law under the Workmen's Compensation Act, 1906; (5) a judgment of the Liverpool Court of Passage (except in admiralty matters, where the appeal lies to the divisional court); (6) a judgment of the Palatine Court of Durham; and (7) a judgment of the Lancaster Chancery Court. Over any matter brought on appeal before the Court of Appeal, the Court has all the power and jurisdiction of the High Court, and may make any order which ought to have been made in the Court below, or such further order as the justice of the case may require.

As a rule, three Judges are required to constitute the Court of Appeal; but appeals from interlocutory orders may be heard by two Judges, as also appeals from final judgments where the parties consent. But, in the latter case, if the Judges differ in opinion, the appeal must be argued before three Judges before going to the House of Lords. Generally speaking, the Court of Appeal sits in two divisions, to hear common law and equity cases respectively; but the only limit to the number of divisions in which it may sit is the

number of Judges available, and any division may, of course, deal with any appellate business which is within the jurisdiction of the Court.

*Reconciliation of law and equity.*—Hardly less important than the organisation and jurisdiction of the Supreme Court, are the principles upon which its business is carried on. And of these it is important to remember, that the Judicature Act, 1873, provides that the rules of common law and equity are to be concurrently administered, and that every Judge of the High Court, in whatever division he may sit, shall give effect to every legal or equitable claim or defence or counter-claim, and shall grant any legal or equitable remedy, such as damages, specific performance, injunction, or any other kind of relief, to which any of the parties to an action might be entitled in respect of any legal or equitable claim properly brought forward. As there were at the passing of the Act many matters in which the rules of equity conflicted with those of the common law, (as, for example, the rules as to waste committed by a tenant for life, and as to assignment of debts and choses in action), section 25 of the Act declared the rules to be followed in certain enumerated cases, and also provided, generally, as we have seen, that where the rules of equity and common law conflicted in the same matter, the rules of equity were to prevail. The Supreme Court is, therefore, a court exercising in every branch of it a complete common law and equitable jurisdiction.

The Judicature Acts do not, however, abolish the distinction between law and equity; but merely prescribe which rule is to be followed in cases where the Court of Chancery would, before the Acts, have applied a different rule from that which a court of Common Law would have applied in the same case. Consequently, where there was no conflict between law and equity before the Acts, the rules of each will



continue to be administered as before. The object of the Acts was to enable either party to any action brought in the High Court to obtain whatever legal or equitable remedy or relief is more appropriate to the circumstances of his claim or defence at one hearing, instead of having to apply for different remedies to different tribunals. The Acts did not create new legal or equitable rights ; they merely provided a more simple and effective remedy for enforcing those which existed before. They united the superior courts of law and equity with a view to the administration in one tribunal of one system of rules in place of the two systems known as law and equity ; and the general aim of the Acts was to enable a suitor to obtain, by one proceeding in one court, the same ultimate result as he would have obtained before 1875 by having selected the court which was able to give him the more effective remedy, or by having brought proceedings in the Court of Chancery and in a court of Common Law in succession. Thus, for example, in cases where the assignee of a debt had formerly to obtain from the Court of Chancery a decree or order compelling the assignor to bring an action in a court of Common Law to recover judgment against the debtor for the benefit of the assignee, the assignee will now simply sue in his own name, making, if necessary, the assignor a defendant. If a person commences in the King's Bench Division an action falling within the class of actions assigned by the Acts to the Chancery Division, the Judge may, as has been said, retain it or transfer it to the Chancery Division ; but, if he retains it, he must determine it according to the rules which would have been applied if it had been tried in the Chancery Division. And a corresponding rule applies if a 'common law' claim, *e.g.*, of damages for fraud, arises in the course of proceedings in the Chancery Division. Again, a judgment of the

High Court given in an action in any division may be enforced by any legal or equitable mode of execution which is in the circumstances appropriate.

When we come to deal, in the three following chapters, with the details of procedure in the High Court, we shall have frequent occasion to refer to rules of procedure which regulate these details. Here it is sufficient to say, that, as regards the rules of procedure and practice to be followed in the Supreme Court, the Judicature Acts give power to a Rule Committee, consisting of certain Judges of the court and two practising barristers and two practising solicitors, to make Rules of Court for the purpose of carrying the Acts into effect. In pursuance of such power, Rules have been made, called the Rules of the Supreme Court, 1883; and these now consist of seventy-two Orders subdivided into Rules. These Rules regulate the practice in all proceedings in the Supreme Court; but the Judicature Acts, and Order LXXII. of the Rules, provide that the procedure and practice in force before the Acts came into operation in 1875 shall remain in force, where no other provision is made by the Acts or the Rules, and so far as they are not inconsistent with the Acts or the Rules. Thus, in probate matters, the practice is still largely regulated by the Probate Rules of 1862, made under the Court of Probate Act, 1857; and in divorce business the practice is regulated by the Divorce Rules of 1865, and subsequent Rules made under the Matrimonial Causes Act, 1857.

### THE ULTIMATE COURTS OF APPEAL.

It was one of the objects of the Judicature Act, 1873, to abolish the appellate jurisdiction which formerly resided in the House of Lords and the Judicial Committee of the Privy Council. So far as the House of

Lords was concerned, the Act of 1873 professed actually to abolish the appellate jurisdiction ; and it made provision for the taking of a similar step by Order in Council, in the case of the Judicial Committee. But, before the Act of 1873 came into operation, these provisions were suspended by the Judicature Act, 1875 ; and they were afterwards entirely repealed by the Appellate Jurisdiction Act, 1876. The jurisdictions of the House of Lords and the Judicial Committee, as ultimate Courts of Appeal, accordingly remain.

I. *The House of Lords*.—It is expressly provided by the Appellate Jurisdiction Act, 1876, s. 3, that an appeal shall lie to the House of Lords from any order or judgment, either of the Court of Appeal in England, or of any of the Scotch or Irish Courts, from which error or an appeal lay thereto at or immediately before the commencement of the Act ; that is to say, the 1st November, 1876. Leave to appeal is unnecessary, whether the order appealed against is final or interlocutory ; except in the case of certain matrimonial causes, and in bankruptcy appeals. In these cases no appeal lies to the House of Lords without the leave of the Court of Appeal.

The practice in appeals to the House of Lords is governed by the Appellate Jurisdiction Acts, 1876 and 1887, and by the Standing Orders and Directions of the House. Every appeal is by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before His Majesty the King in his Court of Parliament, and that the order or judgment may be reversed or varied. In theory, every member of the House of Lords has a right to be present and vote at the hearing of an appeal ; but, by a convention of the Constitution, this right is no longer exercised. On the other hand, it is provided

by the Appellate Jurisdiction Act, 1876, that no appeal may be heard and determined, unless there be present not less than three specially qualified peers, known as Lords of Appeal. This class of peers comprises : the Lord Chancellor, the Lords of Appeal in Ordinary (presently to be mentioned), and such peers as are for the time being holding, or have held, ' high judicial office,' as defined by section 25 of the Appellate Jurisdiction Act, and section 5 of the Judicature Act, 1887.

With regard to the Lords of Appeal in Ordinary, it is enacted, by the Appellate Jurisdiction Act, 1876, that, in order to aid the House of Lords in the hearing and determination of appeals, His Majesty may appoint by patent two (now six) qualified persons, who shall hold office during good behaviour, and notwithstanding the demise of the Crown, but who shall be removable on an Address of both Houses of Parliament. The qualification for such an appointment consists of holding or having held ' high judicial office ' for two years, or having practised for fifteen years as a barrister in England or Ireland, or as an advocate in Scotland. Each of such Lords of Appeal is entitled during life to rank as a baron, and, even after his retirement or resignation, to a writ of summons to attend, and to sit and vote, in the House of Lords ; but his dignity is not hereditary, though his children are entitled to the courtesy prefix of ' Honourable.' The House of Lords may sit as a court of appeal during the prorogation of Parliament, and even during the dissolution of Parliament ; should His Majesty think fit, by writing under his sign manual, to authorise the Lords of Appeal to hold sittings during such dissolution. The House of Lords does not possess the necessary machinery for executing its decrees in judicial matters ; and, accordingly, a decree of the House of Lords is usually made (in England) an order of the High Court.



II. *The Judicial Committee of the Privy Council.*—

The constitution and powers of the Privy Council have been described in a former part of this work (Vol. I., pp. 246–248). Here it is sufficient to say that, by virtue of the Appellate Jurisdiction Act, 1876, the Lords of Appeal in Ordinary now sit as members of the Judicial Committee, and that the two ultimate courts of appeal are therefore becoming largely, though not entirely, identical in composition. The Appellate Jurisdiction Act directs that, subject to the due performance of his duties with regard to appeals in the House of Lords, it shall be the duty of a Lord of Appeal, if a privy councillor, to sit and act also as a member of the Judicial Committee. The same Act also provides, that His Majesty by Order in Council, with the advice of the Judicial Committee or any five of them (the Lord Chancellor being one), and of the archbishops and bishops who are members of the Privy Council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the Church of England as may, by such rules, be determined. Other members of the Judicial Committee are Judges and ex-Judges of the superior Colonial and Indian Courts, and certain persons specially appointed under statutory powers ; all being members of the Privy Council.

An appeal to the Judicial Committee is brought by way of petition ; and printed cases are lodged. The procedure resembles that in the House of Lords ; but is regulated, not by Orders of that House, but by Orders in Council. The Committee, after hearing the parties, and, usually, after taking time for deliberation, delivers a written judgment through the mouth of one of its members, in the form of reasons for humbly advising His Majesty to allow, or (as the case may be) dismiss, the appeal. Differences of opinion

between the members of the Board are not officially recorded.

An appeal lies to the Judicial Committee in the following cases :—in England (i) from the ecclesiastical courts (Vol. I., pp. 340–344) ; (ii) from the Admiralty Court sitting to hear Prize cases ; and, outside the United Kingdom, (iii) from the Channel Islands, (iv) from the highest courts of the self-governing Dominions and other colonies and possessions generally, (v) from the highest courts of British India (where an appeal lies), and (vi) from certain courts established in foreign countries under the Foreign Jurisdiction Act, 1890.

Reference has already been made in the Introduction (Vol. I., pp. 23–25) to the doctrine of judicial precedent ; it may, however, be mentioned here that a judgment of the House of Lords is binding as a precedent upon the Court of Appeal, the High Court, and inferior courts, and is regarded by the House of Lords as binding upon itself ; while the resolutions of the Judicial Committee have binding authority only upon the courts from which an appeal lies to it and the courts inferior to them. The decisions of the English Court of Appeal and High Court have merely persuasive authority before the Judicial Committee, but are entitled to due weight.

#### NOTE ON AUTHORITIES.

[*For the history, Jenks, "Short History of English Law," pp. 354–377. For the Judicature Acts and kindred legislation, Volume II. of the "Yearly Practice."*]

## CHAPTER XXVII.

## PROCEEDINGS IN THE KING'S BENCH DIVISION.

WE now proceed to consider the manner in which the remedy by action is pursued in the High Court of Justice. And in this chapter we shall describe the ordinary procedure in an action in the King's Bench Division; dealing in subsequent chapters separately with proceedings in the Chancery Division, and in the Probate, Divorce, and Admiralty Division.

*Commencement of action.*—An action in the King's Bench Division is commenced by the issue of a WRIT OF SUMMONS, by which the defendant is commanded to 'enter an appearance,' usually within eight days after service of the writ, and is warned that, if he fails to do so, judgment may be given in his absence. Before the writ is issued, the spaces left blank in the form of writ provided must be filled in by the plaintiff or his solicitor with the names and addresses of the parties to the action, and with a statement of the nature of the claim which the plaintiff makes against the defendant. In so doing, care has to be taken, and certain rules and considerations must be borne in mind; otherwise the writ may have to be amended at the plaintiff's expense, or the defect may lead to the writ being set aside altogether, or to the failure of the subsequent proceedings based upon it.

Care must also be taken by a solicitor before issuing, or entering appearance to, a writ of summons, to make certain that he has, in fact, a client in existence, and that he has that client's continuing authority to

institute or defend the action. Both of these facts a solicitor is deemed to warrant; and for a breach of either warranty he may render himself personally liable, however innocent, to pay the other party's costs (*Yonge v. Toynbee* [1910] 1 K. B. 215; *Simmons v. Liberal Opinion Limited* [1911] 1 K. B. 966).

*Parties.*—In naming the parties to the action, care has to be taken to select the proper persons. For example, if the action is brought for breach of a contract made by several persons jointly (such as executors under a will or trustees under a settlement), all who are living must be joined as co-defendants; and, if all have died, the personal representatives of the last survivor must be sued. If the contract sued on is *joint* and *several*, the plaintiff may sue one or more or all in the same action, including the personal representatives of any deceased party to the contract. In actions for tort committed by two or more persons jointly, the plaintiff may sue and recover judgment for the whole of his damages against one or more or all of the wrongdoers. But a release of, or a judgment against one of them bars the action against the others (*Duck v. Mayeu* [1892] 2 Q. B. 511; *Brinsmead v. Harrison* (1871) L. R. 7 C. P. 547).

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise. For instance, a number of shareholders of a company claiming damages for false statements contained in a prospectus may be joined in one action. And all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. But where there are numerous persons having the same



interest in one cause or matter, one or more of such persons *may* sue or be sued, or may be authorised by the Court or a Judge to defend such cause or matter, on behalf or for the benefit of all persons so interested. This is known as a 'representative action,' of which an instance will be found in *Ellis v. Duke of Bedford* [1901] A. C. 1, where six fruit-growers sued the owner of Covent Garden market on behalf of, and as representing, all the growers of fruit within the meaning of a certain Act of Parliament, of whom there may have been many hundreds.

If a person sues or is sued in a representative capacity, such as the trustee of a bankrupt or the personal representative of a deceased person, the fact must be stated in the writ. If a woman is the plaintiff, the writ should state whether she is a wife, a widow, or a spinster. A married woman may sue or be sued as if she were unmarried, and can be made liable to the extent of her separate estate, if any. She should be described as 'A. B., wife of C. B.' There are certain circumstances in which a person who has a cause of action against a married woman may be able to sue her husband alone, or as co-defendant with her (p. 323).

*Infants*.—An infant plaintiff must sue by his next friend, who is personally liable for any costs the plaintiff may have to pay, and is *prima facie* entitled to an indemnity out of the infant's estate; but an action may be commenced against an infant without describing him as such. An appearance is then entered for him by his guardian *ad litem*, who, as a rule, is not ordered to pay costs in the absence of misconduct by him. Any person not under disability, not being a married woman (*Re D. of Somerset* (1887) 34 Ch. D. 465), and not having any interest in the action adverse to the infant, can act as next friend or guardian *ad litem*; and a solicitor who institutes

an action on behalf of an infant plaintiff is deemed to warrant, on the principle of *Yonge v. Toynbee* [1910] 1 K. B. 215 (pp. 487-488), that the next friend himself is not under any disability. For a breach of that warranty he may be held liable for the other party's 'solicitor and client' costs of the action (*Fernée v. Gorlitz* [1915] 1 Ch. 177).

*Lunatics.*—A person who has been found to be a lunatic by inquisition sues and is sued by his committee; the lunatic and the committee both being made parties, and being properly described. A person of unsound mind, not so found, sues by his next friend, and appears by his guardian *ad litem*, as in the case of an infant. Partners may sue or be sued in the firm name (p. 239); and a corporation or registered company in its corporate name.

*Indorsement of claim.*—The nature of the plaintiff's claim must be *indorsed* on the writ. There are three different kinds of indorsement: namely, a *general* indorsement, a *special indorsement*, and an indorsement of claim *for an account*.

(1) *General indorsement.*—In every case the writ may be *generally* indorsed, whatever be the nature of the claim; and this form of indorsement is more frequently used than any other. A general indorsement consists of a very short statement of the nature of the claim made or the relief required in the action; e.g., "the plaintiff's claim is for damages for breach of contract," "£x for the carriage of goods by railway," "£x for freight and demurrage," "£x for the use and occupation of a house," "for damages for im-  
properly distraining," "for damages for slander" (see the Forms of Indorsement in App. A., Part III., in the *Yearly Practice*). Thus, a general indorsement has been aptly described (Odgers, *Pleading & Practice* (8th ed.), p. 44) as "merely a label to show to what class of action the suit belongs."

(2) *Special Indorsement*.—A special indorsement can be used in certain cases only, and need not necessarily be used in any case. The cases in which it may be used are, first, where the claim is for a debt or liquidated sum of money arising out of any contract, express or implied, or arising on a trust or statute ; or, second, where the claim is by a landlord to recover land from his tenant (see, for the precise wording, Order III., r. 6). Thus, a claim for unliquidated damages cannot be specially indorsed, nor a claim for interest in the nature of damages, for instance, interest upon the price of goods sold and delivered in the absence of the defendant's agreement to pay interest. But a claim for interest may be added to a specially indorsed claim, if the interest is payable by an agreement, express or implied, or by statute ; as, for example, under the Bills of Exchange Act, 1882, which enables interest to be claimed, not merely to the date of the writ, but also till payment or judgment. A special indorsement is a statement of claim ; and, without a special order, no further statement of claim can be delivered after it except by way of amendment (p. 517). Hence, a special indorsement must state concisely all the material facts necessary to constitute the cause of action relied on, and must contain particulars sufficient to enable the defendant to make up his mind whether to admit liability or to resist the claim. It must be drawn in the form of a pleading under the heading of the words 'Statement of Claim,' and be signed by the solicitor or counsel who drafted it.

*Advantages of special indorsement*.—The main advantage of a specially indorsed writ is : that, even if the defendant enters an appearance, the plaintiff may apply to the Master by summons for summary judgment under Order XIV. In support of his application, the plaintiff must make an affidavit verifying the cause of action, and stating that in his belief there is no

defence to the action. The summons, with the affidavit, must be served at the defendant's address for service four clear days before the day named for the hearing of the summons. There are several courses open to the Master upon the hearing of this summons. (i) If it appears to him that there is no defence, he will make an order empowering the plaintiff to enter final judgment for the amount claimed, or for the recovery of the land, as the case may be, and costs. (ii) If the defendant has any defence to the action, he may, and generally does, make an affidavit showing cause against the plaintiff's application; and the Master may order the defendant to attend and be examined on oath and produce books or documents. Thereupon the Master, unless satisfied that the alleged defence is a sham, set up merely for the purpose of delay, or that the facts alleged by the defendant do not amount to a defence in law, should give leave to defend as to the whole or part of the claim to which the defence goes. And where there is a triable issue of fact or a doubtful point of law to be decided, the defendant is, as a rule, entitled to unconditional leave to defend; even although the Master may think that the defence is not likely to succeed. (iii) Another course open to the Master is to give conditional leave to defend, *i.e.*, conditional on the defendant giving security or bringing money into court; but the condition of bringing money into court or giving security ought only to be imposed where the defence set up is so vague and unsatisfactory, that the Master is practically certain that there is no defence, but has sufficient doubt to enable him to exercise his discretion in giving leave to defend subject to the conditions, instead of making an order for judgment (*Jacobs v. Booth's Distillery* (1901) 85 L. T. 262).

(iv) Where the defendant has no defence to the claim, but sets up a plausible counter-claim, judgment



is sometimes given for the plaintiff on the claim, with a stay of execution as to so much of the claim as is covered by the counter-claim, till the trial of the counter-claim. But if part of the claim only is admitted, and the counter-claim is for a larger amount, the plaintiff is, as a rule, not entitled to any judgment till the trial.

(v) With the consent of both parties, the Master may either refer the action to another Master for trial, or he may finally dispose of the matter himself in a summary manner; but the second of these alternatives is very rarely, if ever, adopted.

(vi) In the event of leave to defend being given, whether conditional or unconditional, the Master usually treats the summons as a summons for directions (pp. 500-502), and gives the necessary directions for the further conduct of the action.

Finally, it should be noted, that the costs of an application under Order XIV. for leave to sign summary judgment may be dealt with by the Master hearing the application, or may be referred by him to the Judge at the trial. If the plaintiff succeeds in his application, costs will usually be granted to him on a fixed scale; but if he makes an application when the case is not within Order XIV., or when he knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed, and the plaintiff ordered to pay the costs forthwith.

The necessity for the student to become familiar, at an early stage, with the precise wording of Order III., r. 6, and Order XIV., and with the notes thereon contained in the practice books, must be emphasised.

(3) *Indorsement for an account*.—The third kind of indorsement is for an account; and in all cases in which the plaintiff desires to have an account taken

in order to ascertain how much the defendant owes him, he ought to indorse the writ with a claim that such account be taken. Unless there is some preliminary question to be tried, the Master will, on the plaintiff's application, order an account to be taken by a Master, a District Registrar, or an official or special referee under the Arbitration Act, 1889 (pp. 435-436). In these circumstances, the defendant may be ordered to deliver an account, which the plaintiff may after investigation 'falsify,' by showing that the defendant has taken credit for payments which he never made, or 'surcharge,' by showing that the defendant has received sums of money for which he has not given credit. When the disputed items in the account have been disposed of, an order can be made that the defendant pay the balance shown by the correct account to be due to the plaintiff. But claims for account are more frequent in the Chancery Division than in the King's Bench Division ; and a fuller description of the process of passing accounts under the supervision of the court will be found in the following chapter (pp. 561-567).

*Joinder of causes of action.*—A writ may be indorsed with more than one cause of action against the defendant (Order XVIII., r. 1). As a general rule, the plaintiff may join on his writ any number of different causes of action against the same defendant ; but, if they cannot be conveniently tried together, the Court may order any of them to be tried separately, and there are certain special cases where joinder is forbidden (Order XVIII., rr. 2, 3, 5). But this does not mean that a very large number of different causes of action should be joined in one writ ; and, if this is done, the Court may limit the action to some of the causes. So, in an action for the infringement of twenty-three patents, all being included on one writ, the plaintiff was directed to select three and confine

himself to them for the present (*Saccharin Corporation v. Wild* [1903] 1 Ch. 410).

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant. But alternative inconsistent claims by several plaintiffs against the same defendant are liable to be disallowed as embarrassing; and a personal claim by a plaintiff joined with one on behalf of himself and other shareholders of a company, has been held bad.

The circumstances in which the joinder of causes of action against several defendants will be permitted are not clear. In *Sadler v. Great Western Railway* [1896] A. C. 451, the plaintiff, who complained that each of two railway companies by their several acts, and both of them by their combined acts, obstructed the access to his premises, was not permitted to join both defendants in one action for damages for nuisance and for an injunction. But, since that decision, an amendment in the Rules has been made which is generally considered to make possible a more liberal construction, subject always to the power of the Court to strike out a party on the ground of embarrassment. Thus, an omnibus passenger who was injured in a collision between the omnibus and a cart, was allowed to join the omnibus company and the owner of the cart as defendants in one action, alleging the joint negligence of the servants of both of them, and, in the alternative, the separate negligence of the servants of each of them (*Bullock v. London General Omnibus Co.* [1907] 1 K. B. 264). And a frozen-meat company, whose meat had been damaged, was allowed to join as defendants on the same writ a ship-owner who had agreed to carry their frozen meat, and another ship-owner whose ship the former ship-owner procured for that purpose; the former being sued upon the agreement to carry by his own or other

steamers, the latter upon the bill of lading issued on his behalf upon the shipment of the meat upon his steamer (*Compañia Sansinena v. Houlder Brothers & Co., Limited* [1910] 2 K. B. 354). Finally, in *Thomas v. Moore* [1918] 1 K. B. 555, eight plaintiffs were allowed to sue six defendants upon one writ, and join what was apparently a joint claim for conspiracy against all the defendants with separate claims for slander against each of them. But (*per* Pickford, L.J., at p. 565) “joinder of parties and joinder of causes of action “are discretionary in this sense, that, if they are “joined, there is no absolute right to have them “struck out, but it is discretionary in the Court to “do so if it thinks right.”

*Issue of writ.*—The next step after settling the contents of the writ is to issue it. For this purpose, two forms must be filled up and taken to the writ department of the Central Office, or to a District Registry, where they are marked in the top right-hand corner with a letter and number of identification, and are sealed by the officer. One of the forms is stamped with an impressed stamp for thirty shillings, and filed by the officer; the other is not stamped, but is sealed and returned to the person issuing it, and becomes the writ in the action. It is not necessary to obtain leave to issue a writ, except when the plaintiff desires to join on his writ several causes of action which cannot be joined without leave (*e.g.*, where the plaintiff in an action for recovery of land wishes to join some unrelated cause of action with it), or where the writ is issued for service out of the jurisdiction.

*Service out of the jurisdiction.*—Leave to issue a writ for service outside England or Wales must first be obtained on application made to a Judge in chambers (Order XI.). The Judge has no power to give leave except in one or other of the following cases: viz. (1) when the whole subject-matter of the action is land



within the jurisdiction, or relates to any act, deed, will, or liability affecting such land ; or (2) when the defendant is a person domiciled or ordinarily resident within the jurisdiction ; or (3) the action is for the administration of the personal estate of any person who at his death was domiciled within the jurisdiction, or for the execution of any trust in writing (of which the person to be served is a trustee) as to property within the jurisdiction which ought to be executed according to English law ; or (4) when the action is one brought *against a defendant not domiciled or ordinarily resident in Scotland* (a) to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract (i) made within the jurisdiction, or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or (iii) by its terms or by implication to be governed by English law ; or is one brought (b) in respect of a breach committed, within the jurisdiction, of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction. The operation of the second half of this Rule, *i.e.* (b), is equally excluded when the defendant is domiciled or ordinarily resident in Ireland. The meaning of the clause : “even though such breach “was preceded,” etc., will be best realised by a reference to the decision in *Johnson v. Taylor* [1920] A. C. 144, revealing a difficulty arising in connection with c.i.f. contracts, which the now amended and much widened Rule is designed to meet ; or (5) when the action is founded on a tort committed within the jurisdiction ; (6) where an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within

the jurisdiction is sought to be prevented or removed ; (7) when any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction ; or (8) when the action is brought by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction, and asks for sale, foreclosure, redemption, re-conveyance, or delivery of possession. The application for leave must be supported by affidavit verifying the cause of action, and stating the grounds of the application, and where the defendant is, and whether he is a British subject. When the defendant is in a foreign country, then, whether he is a British subject or not, notice of the writ instead of the writ itself is served upon him ; and, in the case of the countries to which Order XI., r. 8, applies, the notice of the writ must be transmitted through diplomatic channels.

The Rules also contain powers enabling a plaintiff to serve a foreign principal who contracts through an agent residing or carrying on business within the jurisdiction, with a writ of summons, by serving it upon the agent (O. IX., r. 8 a), and enabling the parties to any contract to confer by agreement upon the High Court of Justice jurisdiction in respect of such contract, and to fix a place and a person within or without the jurisdiction, at which and upon whom service of a writ of summons in an action in respect of such contract shall be deemed to be good and effective service. Mention should also be made of the Legal Proceedings against Enemies Act, 1915, which appears to be a permanent statute.

*Service of writ.*—The next step after issuing the writ is to serve it on the defendant. Unless the defendant's solicitor undertakes, as is the usual course, to accept service on his behalf, the writ must, as a rule, be served personally on the defendant, by handing him a copy

of the writ and showing him the original if he asks to see it. When prompt personal service is impossible, leave may be obtained from the Master for 'substituted service,' *i.e.*, service on the defendant's agent, or by advertisement, or by sending the defendant a copy of the writ in a registered letter, or by some mode of bringing the issue of the writ to the defendant's knowledge otherwise than by personal service. The application for substituted service must be supported by an affidavit stating the grounds on which it is made (O. X.).

*Appearance to writ.*—After service of the writ, the defendant must enter an appearance, by delivering at the Central Office, or the District Registry out of which the writ was issued, a memorandum in writing containing the name of his solicitor, or a statement that he defends in person, and giving his address for service of notices or other documents in the action. The defendant must, on the same day, give notice of his appearance to the plaintiff's solicitor.

*Default of appearance*—(Order XIII.).—If the defendant does not enter an appearance within the time stated in the writ, the plaintiff may, after filing an affidavit of service, enter judgment against the defendant. Where the writ, whether generally or specially endorsed, is for a debt or other liquidated sum of money, the judgment is final; but where the claim is for unliquidated damages, or for the recovery of a chattel, the judgment is 'interlocutory,' and an order is made for the assessment of the damages or the value of the chattel by a Master or official referee, or by a jury summoned upon a writ of inquiry addressed to the sheriff. After interlocutory judgment has been entered, the defendant cannot deny his liability; but he may dispute the amount for which he is liable, and for that purpose attend in person or by solicitor or counsel, and give evidence, if he chooses, as to the

assessment of the damages. The plaintiff may sign final judgment for the amount of the damages so assessed. If the action is for the recovery of land, the plaintiff may, in default of appearance, enter judgment for recovery of possession.

In any case in which judgment has been entered in default of appearance, the Court has a discretionary power to set aside the judgment on such terms as it may think fit (O. XIII., r. 10, and O. XXVII., r. 15). The application to set aside may be made by the defendant by summons before a Master, or District Registrar, where the judgment was signed in a District Registry, and must be supported by an affidavit stating the circumstances under which the default arose, and disclosing the nature of his defence. The Master, if he grants the application, generally does so on the terms that the defendant shall pay all costs occasioned by his default, including the costs of the application to set aside; unless the judgment was obtained irregularly, in which case the defendant is, as a rule, entitled *ex debito justitiæ* to have it set aside, except in the case of an insignificant and accidental slip (*Armitage v. Parsons* [1908] 2 K. B. 410).

Where the action is of such a nature that it could only have been formerly brought in the Court of Chancery—as, for example, where the writ is endorsed with a claim for an injunction—the plaintiff cannot enter judgment in default of appearance, but must file a statement of claim in the Writ Department, and proceed with the action as if the defendant had appeared. In default of appearance and defence, the statement of claim will stand as admitted; and the plaintiff can then move for such judgment as he is entitled to on the facts therein alleged (p. 552).

*Summons for directions.*—If the defendant enters an appearance, the next step in the action is for the



plaintiff to take out a summons. The nature and object of the summons depend to some extent upon the endorsement on the writ. In all cases where the writ is 'generally' endorsed, the plaintiff must, within fourteen days after the defendant's appearance, take out a SUMMONS FOR DIRECTIONS under Order XXX. If he neglects to do so, an application may be made by the defendant to dismiss the action for want of prosecution ; and the Master may, on such application, either dismiss the action, or, as is more usual, give directions as if the application were a summons for directions. When the writ has been 'specially' endorsed, the plaintiff may, as has been already explained, apply for summary judgment under Order XIV. ; or he may take out a summons for directions under Order XXX. ; or he may, without taking out either kind of summons, wait until the time has expired for delivering a defence to the statement of claim endorsed on the writ, and then sign final judgment in default of defence. If a summons is taken out under Order XIV., and leave is given to defend, the Master has power to give, and generally does give, all such directions as might be given on a summons for directions under Order XXX. If no summons is taken out, and a defence is delivered, application must then be made, on a summons for directions, to fix the place and mode of trial.

On a summons for directions in chambers, the Master decides how the action is to be conducted by the parties after the defendant's appearance until the trial and judgment. The original summons requires a ten shilling stamp. At the first hearing all the necessary directions as to the future conduct of the action are not usually given ; because the parties probably do not know, at so early a stage in the proceedings, what will afterwards be required. The summons may therefore be restored to the Master's

list by either party, without additional fee, for further directions, on two clear days' notice of the intended application being given to the other side. The matters usually dealt with on a summons for directions are pleadings, place and mode of trial, and discovery, leaving other interlocutory matters to be raised subsequently by notice under the summons. These enumerated matters require separate consideration.

*Pleadings.*—In the case of a generally endorsed writ, after the defendant has entered an appearance, neither party can (with certain exceptions for which reference should be made to the notes upon O. XIX., r. 1, in the *Yearly Practice*) deliver any pleading without an order of the Master. On the first hearing of the summons for directions, an order is usually made for the delivery by the plaintiff of a statement of claim, unless the writ has been specially indorsed, and for the delivery by the defendant of a defence. The main objects of pleadings are, to ascertain what are the questions of fact or law at issue between the parties, and to give each party notice of the case which the other intends to set up at the trial. To attain these objects, certain rules of pleadings have been provided, of which the fundamental rule is, that every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, and not the evidence by which they are to be proved, nor the law which the party pleading will seek to deduce from the facts.

The first essentials of a good pleading are, therefore, clearness of statement and brevity. It should be concise and also precise. It must state facts and not law; and must only set out material facts essential to making out the cause of action or defence relied on. Neither party need allege in any pleading any fact which the law presumes in his favour, or as to

which the burden of proving the contrary lies on the other side, unless that fact has already been specifically denied by his opponent. The pleading ought not to set out any circumstances which merely tend to prove the truth of the material facts alleged. As to the form of pleadings, the rules provide that a pleading must be divided into paragraphs numbered consecutively, and that, if it contains less than ten folios (720 words) it may be written, but if ten folios or more it must be printed. All sums, dates, or numbers must be expressed in figures and not in words. The pleading, if settled by counsel, must be signed by him; and if not so settled, it must be signed by the solicitor, or by the party, if he sues or defends in person.

*Statement of claim.*—The STATEMENT OF CLAIM must set out the material facts on which the plaintiff bases his claim, and the precise remedy or relief which he seeks to obtain. As the general endorsement on the writ does not require a statement of the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled, the claim may be altered, extended, or modified by the statement of claim without amending the endorsement on the writ, provided that the claim does not entirely change the cause of action. The different kinds of remedy or relief which may be claimed are damages, possession, mesne profits, arrears of rent, delivery up of a chattel, specific performance or an injunction, the setting aside, cancellation, delivery up, or rectification of a written instrument, a mere declaration of the plaintiff's rights, or an account, according to the nature of the cause of action. In a proper case, these remedies may be claimed in the alternative, or by way of cumulative relief; as we shall see, some of them are more appropriately claimed in an action in the Chancery Division.

*Damages*.—It is convenient in the first place to explain the distinction between *damage* and *damages*; though it must be admitted that the distinction is not always accurately observed in legal speech or writing, whether judicial, forensic, or otherwise. *Damage* is both a popular and a technical term. It is popular in the sense of ‘harm’; it is technically used by lawyers in the expression ‘special damage,’ meaning that kind of actual damage or harm, without which certain wrongful acts are not torts, *i.e.*, are not actionable, *e.g.*, deceit and certain kinds of slander (pp. 335–336), or that amount of loss or damage resulting from a breach of contract which is, generally speaking, only recoverable when the special circumstances giving rise to it were known to the party breaking the contract at the time of the making of the contract. *Damages*, on the other hand, is not a popular term, but a technically legal one, and is defined in the *Concise Oxford Dictionary* as a “sum of “money claimed or adjudged in compensation for loss “or injury”—a definition which will not satisfy all the kinds of damages about to be mentioned, but will serve well enough to mark the contrast with damage in the purely physical sense. Thus, speaking broadly, *damage* is the harm sustained as the result of a wrongful act or omission, whether a breach of contract or a tort; *damages* are the sum which the law awards to the person harmed, in most cases by way of compensation for the harm sustained. It is desirable to keep this distinction in mind, and, as far as is possible consistently with usage, to preserve it in discussion of the subject.

In all cases of breach of contract, the law presumes that the party entitled to the performance has suffered some loss or injury as the result of the other party’s failure to perform. Similarly, in the case of those torts which are breaches of absolute or unqualified rights



(p. 272), for instance, in the case of the right to personal safety or freedom, which is infringed by assault or battery or false imprisonment, or the right to reputation, which is infringed by the publication of a libel, or the right to exclusive and undisturbed possession of property, which is infringed by any act amounting to a trespass, the law presumes that some injury has been suffered by the plaintiff whose right has been infringed. And, in cases of breaches of contract and of torts of this nature, such loss or injury is often referred to as 'general damage.' In such cases, the plaintiff will at any rate be entitled to recover a nominal sum, provided that he can prove the breach of contract or the tort; he may therefore 'aver it generally' in his statement of claim, and need not prove it at the trial. Whether he will get judgment for a nominal or for a substantial sum, will depend on the question whether he has suffered substantial loss or injury or not.

'Special damage,' on the other hand, is damage which the party asserting it must specifically allege in his pleading and prove at the trial. It consists of some particular loss or injury which he has suffered in consequence of the defendant's breach of duty, and which the law will not presume as damage in the natural course of events happening to any person whose right is similarly infringed; for instance, in an action for damages for personal injury resulting from the defendant's negligence, medical and nursing expenses, or the salary and commission which the plaintiff would probably have earned as a commercial traveller, but for his injuries. Special damage, if suffered, must therefore be alleged with sufficient particulars to give the defendant notice of the nature and extent of the loss sustained; otherwise the plaintiff will not be allowed to give evidence of such loss at the trial. In some cases, the fact that special

damage has been suffered is essential to give the plaintiff a right of action ; and in such cases it must therefore be pleaded as one of the material facts necessary to constitute a good cause of action. Thus, in an action founded on negligence, or in an action of Deceit, or of slander not actionable *per se*, or in an action brought by a private individual in respect of a public nuisance, and in actions 'on the case' generally, the statement of claim would not disclose any cause of action without an averment of some actual loss or injury sustained by the plaintiff by reason of the acts or omissions complained of.

In the case of a breach of contract, the damages recoverable may be (1) *liquidated*, that is, where the parties have in their contract made a genuine pre-estimate of the damage likely to arise from a breach, and fixed a sum or a basis for its calculation, and not merely named a penalty, or (2) *unliquidated*, in which case they may be *general damages* or *special damages*, the latter being recoverable only when the special circumstances giving rise to the special damage were known to, and assented to by, the party breaking the contract at the time when it was made (*Hadley v. Baxendale* (1854) 9 Ex. 341 ; see pp. 81-83 of this volume). It is worth noting that the Sale of Goods Act, 1893, s. 54, recognises the term 'special damages.'

In tort, on the other hand, damages are always unliquidated.

There are several other terms used in connection with the subject of damages which must be mentioned.

*Substantial damages* or *ordinary damages* are perhaps the most normal and frequent kind of damages ; and they are awarded in order to compensate the plaintiff for the loss or injury which he has in fact sustained, subject of course to the rules as to remoteness and other rules which limit the amount of damages recoverable. In the case of

actions by a customer against a banker for wrongfully dishonouring a cheque, substantial damages are recoverable without proof of actual loss.

*Nominal damages*, for instance, forty shillings or one shilling or sometimes even less than that, may be awarded where the plaintiff has brought the action, not for the purpose of obtaining compensation, but merely to establish the existence of the right infringed by the defendant, or to clear his character from defamation, or where he has not suffered any actual loss from the breach of contract or other duty complained of. They were described by Maule, J., as follows: "Nominal damages, in fact, mean a sum of money that may be spoken of, but has no existence in point of quantity."

*Contemptuous damages*, for instance, a farthing, are awarded by the jury when they wish to mark their opinion that the plaintiff ought never to have brought the action, and their hope that the Judge will deprive him of the costs of the action, as frequently happens in such a case.

*Exemplary or vindictive or punitive damages* may be awarded in such actions as those for seduction, assault, false imprisonment, malicious prosecution, libel, slander, or trespass, in order to punish the defendant by condemning him in an amount of damages in excess of that which would adequately compensate the plaintiff for the actual loss or injury suffered; exemplary damages cannot be awarded in actions for breach of contract, except in the case of actions for breach of promise of marriage.

If the amount of damages claimed is mentioned in the statement of claim, the plaintiff cannot recover any sum in excess of the amount claimed, unless the Judge gives leave to amend the claim, which he will do in a proper case (*Chattell v. The Daily Mail* (1901) 18 T. L. R. 165). In practice, any facts in

aggravation of damages may be set out in the statement of claim.

*Possession*.—In an action for the recovery of land the plaintiff usually claims possession, mesne profits till delivery of possession, and arrears of rent, if any, or double value in respect of the premises claimed; and, as has been said, he may also add a claim for damages for breach of any contract under which the land was held, or damages for any injury to the land.

*Delivery of chattel*.—In an action for the detention of a chattel, the claim is generally for the delivery up of the chattel, or payment of its value, and damages for its detention. Since 1854, the defendant in an action of detinue has lost the option, which he formerly had, of either returning the chattel to the plaintiff or paying its value; and the Court may upon the plaintiff's application order the defendant to restore the chattel to him (see p. 364 for Detinue and p. 543 for Writ of Delivery).

*Equitable relief*.—The plaintiff may claim specific performance of a contract, or an injunction to restrain a breach of contract or the commission of a tort, or a receiver of the incomings of any property (pp. 585–586), or the rectification or setting aside of any written instrument; because, although these forms of relief are more commonly granted in actions brought in the Chancery Division, every kind of equitable relief may now be claimed in an action in the King's Bench Division.

*Declaratory judgment*.—The plaintiff may claim a declaration of his rights; as, for example, that he has a lien on certain property.

*Account*.—The plaintiff may claim that an account be taken for the purpose of ascertaining the amount of the balance due to him from the defendant, or the amount of profits which the defendant has made out of the transactions complained of by the plaintiff, for



instance, infringements of the plaintiff's trade mark. In cases of tort in which such an account is ordered, it is usually an alternative to damages for the tort.

*Defence.*—Within ten days from the delivery of the statement of claim, if no other time is specified in the order, the defendant must deliver his DEFENCE ; otherwise the plaintiff may enter judgment or move for judgment, in the same way as he would have been entitled to do if the defendant had failed to enter an appearance (p. 499).

In settling the defence, the main rules of pleading to be borne in mind are : that it is not sufficient for the defendant merely to deny his liability generally, but that he must deal specifically with every allegation of fact in the statement of claim of which he does not admit the truth ; and that (unless he is an infant, or a lunatic, or person of unsound mind not so found by inquisition) he is taken to admit every material fact alleged in the statement of claim, unless he denies it, specifically or by implication, or states that he does not admit it. To these rules there is an important exception, that no denial as to damages claimed is necessary ; for an allegation of general or special damage is deemed to be put in issue in all cases, unless expressly admitted.

In answering the statement of claim, the defendant may take one or more of the following courses.

- (i) *Traverse* : that is, he may deny every or any allegation of fact made in the statement of claim.
- (ii) *Confession and avoidance* : that is, he may admit the facts alleged, or any of them, and avoid or alter their effect by stating other facts. For example, if the action is for breach of contract, the defendant may admit that he made a contract, and plead by way of avoidance that the contract was subsequently rescinded, or was performed, or was illegal, or is not enforceable by reason of infancy, fraud, the Gaming Acts, the Statutes

of Limitation, or the Statute of Frauds. All equitable or statutory defences must be specially pleaded.

(iii) *Objection in point of law*: that is, he may say that, even assuming the facts alleged in the statement of claim are true, they do not entitle the plaintiff to the relief or remedy claimed; and the object of raising a point of law is, that the defendant may apply for an order that the question of law be tried as a preliminary point before the trial of the other issues in the action. This third course has taken the place of the old proceeding known as a *demurrer* which was abolished in name in 1883. It is sometimes clearly more expeditious and convenient, before investigating a long series of disputed facts, to argue before the Court, and get a decision upon, a point of law which may make it quite unnecessary to investigate the facts alleged. Instances of points of law determined in this way will be found in the notes to O. XXV. rr. 1, 2, 3, in the Practice books. Thus, in *Dulieu v. White* [1901] 2 K. B. 669, it was decided in this way that damages may be recovered, in an action founded on negligence, for physical injury ensuing upon a nervous shock, even though the plaintiff sustained no actual impact from the defendant's negligently driven vehicle. Another step which sometimes serves the same purpose as an objection in point of law, but is more drastic and peremptory, is an application to the Court under Order XXV., r. 4, to strike out an opponent's pleading on the ground that it discloses no reasonable cause of action or answer, or that the action or defence disclosed in the pleading is frivolous or vexatious; whereupon the Court may order the action to be stayed or dismissed, and give judgment accordingly. For instance, if your client was a member of either House of Parliament, and was sued for damages for slander contained in a speech made in the course of debate in Parliament, you could apply

for the statement of claim to be struck out, on the ground that, speeches in Parliament being absolutely privileged, no cause of action was disclosed ; and that would be an end of the matter. In addition, Order XIX., r. 27, gives the Court power at any stage of the proceedings to strike out any pleading “ which may “ be unnecessary or scandalous or which may tend to “ prejudice, embarrass, or delay the fair trial of the “ action ” ; and the Court has an inherent jurisdiction to stay proceedings and strike out claims or defences which are frivolous or vexatious or an abuse of the process of the Court. By the Vexatious Actions Act, 1896, the High Court may, upon the application of the Attorney-General, make an order that a person “ who “ has habitually and persistently instituted vexatious “ legal proceedings without any reasonable ground ” shall be prevented from instituting proceedings in any court except by leave of the High Court.

*Particulars.*—It is important that each party should know as precisely as possible before going into court the case which he has got to meet. Accordingly Order XIX., r. 6, provides that a party pleading shall, in certain specified cases and in all other cases where necessary, state in his pleading the necessary particulars of his allegations. The object of particulars is to narrow the issues of fact so as to save expense, or bind the party giving the particulars to definite details or incidents, or to explain vague or general allegations in the pleading which cannot be properly answered by the other side without more specific information. Thus, particulars must always be given by a party who relies on any misrepresentation, or fraud, or negligence, undue influence, or any general charge of misconduct, or who claims special damage.

A party who is not satisfied with the particulars given in his opponent's pleading may apply to the Master, usually by notice under the summons for

directions (which is, so to speak, 'kept alive' for this and similar purposes), for an order for 'further and better particulars'; and, in dealing with the costs of such an application, the Master will take into consideration the question whether the applicant has previously applied to his opponent by letter for such further and better particulars, and with what result. As to the time of the application, it is provided (Order XIX., r. 7 B) that further and better particulars of a claim are not obtainable by a defendant before delivering his defence, unless the Court considers they are necessary or desirable to enable the defendant to plead, or for any other special reason ought to be delivered before defence.

*Payment into court.*—In an action for debt or damages, the defendant may, before or at the time of delivering his defence, or at any later time by leave, pay into court a sum of money by way of satisfaction, which is taken to admit the claim or cause of action, to the extent to which the payment in is made; or the defendant may pay money into court with a defence denying liability, except in actions or counter-claims for libel or slander. Notice must be given by the defendant to the plaintiff where payment is made before defence; and the payment in must be signified in the defence. Where money is paid in before defence, or without a denial of liability, the plaintiff may have the money paid out to him, unless the Court otherwise orders; and, if not satisfied with the amount, may nevertheless continue the action to recover the balance of his claim. Where the money is paid in with a denial of liability, the plaintiff may, within the prescribed limit of time, accept it in full satisfaction of his claim; and, after notice to the defendant of acceptance, may tax and recover payment of his costs. If he does not accept the sum paid in, but proceeds with the action,



he will, as a rule, if he does not succeed in obtaining judgment for more than the amount paid in, be ordered to pay the defendant's costs incurred subsequent to the date of payment in. If he recovers less than the amount paid in, the balance will be repaid to the defendant.

In the case of actions for libel or slander, money cannot be paid into court with a denial of liability; but it may be paid in without a denial of liability under the Rules now under discussion, either as an attempt at a compromise or as an essential part of the defence of apology and amends afforded by the Libel Act, 1843 (p. 342).

*Tender*.—If, before action brought for a liquidated claim, the defendant has offered to pay the amount claimed, he may plead a *tender* (pp. 69–70); but, if so, he must pay into court the sum so tendered. If the plea is upheld at the trial, the defendant will be entitled to his costs of the action. Tender, in the cases where it is appropriate, is a defence, and not a mere attempt at a compromise, like payment into court.

*Set-off*.—Where the claim is for a debt or other liquidated amount, the defendant may set up any cross-claim for a debt or other liquidated amount. This power was first conferred by the Statutes of Set-Off of 1728 and 1734, which have now been repealed and replaced by s. 24, sub-s. 3, of the Judicature Act, 1873, and Order XIX., r. 3. Where the SET-OFF is established, it operates as a good defence to the action, if it is not less than the amount of the claim; and it reduces, *pro tanto*, the amount of the judgment if it is less than the claim. But if it exceeds the amount of the claim, the defendant cannot recover the balance in that action. Claims cannot be the subject of set-off, unless they exist between the same parties and in the same right. For instance, to a

claim by a plaintiff in a representative capacity, a debt due from the plaintiff personally may not be set off. But a defendant can set off a debt originally due from the plaintiff to a third party, which the third party has assigned to the defendant before the issue of the writ. Set-off is a defence, and should be pleaded as such.

*Counter-claim.*—The defendant may admit the plaintiff's claim in his defence, subject to a COUNTER-CLAIM; or he may dispute the claim in the defence and also set up a counter-claim. A counter-claim is in the nature of a cross-action, which the defendant is entitled, under s. 24, sub-s. 3, of the Judicature Act, 1873, to set up against the plaintiff, to the same extent as if he had brought a separate action against the plaintiff for the purpose. The subject-matter of the counter-claim need not be of the same nature as the claim, nor need it even arise out of the same transaction, or have any relation or analogy to it. Any cause of action or claim of any nature or amount, which the defendant may have against the plaintiff, may be set up by way of counter-claim, subject to the plaintiff's right to raise the objection that the claim made by the defendant cannot be conveniently tried by the same court or at the same time as the plaintiff's claim, and ought to be disposed of in an independent action. On this ground, the Master has power to strike out the counter-claim, and leave the defendant to bring an independent action. What is pleaded in the defence as a set-off may also be set up by way of counter-claim; but the converse is not true. Counter-claim is wider in its scope than set-off; but set-off is a defence, and, whenever the same claim can be pleaded either as a set-off or as a counter-claim it will generally be found valuable to plead it as both.

For most purposes, the claim and counter-claim are

treated as independent actions, combined for the purpose of determining all the matters in difference between the parties. Thus, if the plaintiff discontinues his claim, the defendant is still entitled to proceed with the counter-claim. Where the defendant recovers more on the counter-claim than the plaintiff recovers on the claim, the Court has a discretion to order judgment to be entered for the defendant for the balance; but the more usual practice, where the plaintiff succeeds on the claim and the defendant succeeds on the counter-claim, is that two judgments should be entered, one for the plaintiff on the claim with costs, and the other for the defendant on the counter-claim with costs. Where both plaintiff and defendant fail, judgment is entered for the defendant on the claim with costs, and for the plaintiff on the counter-claim with costs; the costs to be set off, and an order being made for the payment of the balance. The same rules as to pleading and particulars apply to a counter-claim as to a statement of claim.

*Third-party notice.*—The defendant may, before delivering the defence, apply *ex parte* to the Master for leave to issue a 'third-party notice' against a third person who is not a party to the action, on the ground that he is entitled to contribution towards, or indemnity against, the plaintiff's claim, by such third person. The object of third-party procedure is to avoid multiplicity of actions; and the procedure will not usually be allowed except in clear cases of contribution or indemnity, where all the questions between the parties can be conveniently decided in one action, and where the defendant's right against the third person is solely dependent on his liability to the plaintiff. For instance, a co-surety, or a co-director sued under s. 84 of the Companies (Consolidation) Act, 1908, may find it convenient to make use of this procedure in seeking contribution

from his fellow sureties or fellow directors ; and an agent who is entitled to an indemnity by his principal may resort to it. But leave will not be granted to issue a third-party notice where its effect would be to hamper or embarrass the plaintiff. The plaintiff against whom a counter-claim has been set up, may issue a third-party notice against a person from whom he claims contribution or indemnity in respect of the counter-claim.

If leave is given to issue a third-party notice, a copy must be served on the third party, according to the rules relating to the service of writ of summons, together with a copy of the statement of claim, or, if there is none, then with a copy of the writ in the action. The third party must enter an appearance if he disputes the plaintiff's claim against the defendant, or his own liability to the defendant. After the third party has entered an appearance, the defendant must apply to the Master for directions ; and the Master, if satisfied that there is a question proper to be tried as to the liability of the third party, may give directions as to the trial of such question. But he may refuse to do so, and in effect strike the third party out of the action, if the question of liability is complicated, or if its introduction into the action will embarrass the plaintiff.

*Reply.*—After delivery of the defence, the plaintiff can only deliver a *REPLY* by leave, which will not be given unless the plaintiff wishes to set up some additional facts by way of confession and avoidance of the defence, or to raise an objection in point of law, or to deny some only of the facts alleged in the Defence while admitting others, or to put in a defence to a counter-claim. In this last case the pleading is usually called a 'Reply and Defence to Counter-claim.' If there is no reply, all the material facts alleged in the defence are deemed to be denied. The rules



applicable to a defence apply to a defence to a counter-claim.

The pleadings are generally closed at this stage ; but it is possible, with leave, to have a 'REJOINDER,' a 'SURREJOINDER,' a 'REBUTTER,' and a 'SURREBUTTER.'

*Amendment of pleading.*—A statement of claim, whether specially endorsed on the writ or delivered separately, or a counter-claim or set-off, may be amended once without leave, before or after the delivery of the defence ; but no further amendment can be made without the leave of the Master in chambers or the Judge at the trial. The defendant, however, can never amend his defence without leave, except where the statement of claim has been amended. Leave is usually given to make any amendment which may be necessary for the purpose of determining the real questions in dispute between the parties, if it will not cause injustice to the other side ; but it is generally given on the terms that the party making the amendment shall pay the costs thereby occasioned.

*Mode of trial.*—In the King's Bench Division, an action is tried by a Judge alone, or by a Judge with a jury, or by a Judge sitting with assessors (which is very rare in the King's Bench Division, though common in Admiralty), or by an official referee or special referee, with or without assessors.

In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, or in actions in which fraud is alleged, either party is entitled to obtain a jury, merely by making an application within fourteen days after the close of the pleadings, or, if there are no pleadings, at the time of, or within fourteen days after, the making of the order directing the mode of trial (Administration of Justice Act, 1920, s. 2 ; Provisional Rules (No. 1). 1922 ; Order XXXVI. (new)).

In other cases, where the Court or a Judge is

satisfied, upon an application made by either party, that the action cannot as conveniently be tried with a jury as without a jury, the Court or a Judge has power (except in the cases above mentioned) to order the action to be tried without a jury. Or the plaintiff may signify his desire to have the action tried without a jury; and thereupon, without prejudice to the discretion of the Court, an order will be made to that effect, unless any party makes an application to the contrary (Administration of Justice Act, 1920, s. 2; Provisional Rules (No. 1), 1922; O. XXXVI. (new)).

Where a jury is required, or ordered on a summons for directions, the jury will be a common jury; unless either party applies for a special jury at the time when the mode of trial is fixed, or the Court at some later stage considers a special jury desirable.

If the questions at issue involve any prolonged examination of documents, or any scientific or local investigation, which cannot conveniently be made before a jury or conducted by the Court, or if they consist of matters of account between the parties, the Master or the Judge may, under the Arbitration Act, 1889, ss. 13 and 14, order the whole action, or any questions of fact, to be tried before an official or special referee, or by an arbitrator agreed on by the parties.

The effect of these somewhat complicated rules appears to be, that the normal method of trial is by a Judge alone without a jury, and that if no other mode of trial is required or ordered, in accordance with the rules above referred to, the action will be tried in that way (Provisional Rules (No. 1), 1922; O. XXXVI.).

*Place of trial.*—On the summons for directions, the Master decides also where the action shall be tried; whether at the Royal Courts of Justice in the Strand,

or at assizes, or in a county court. But the Master is bound by certain rules which require some explanation.

(a) *Contract or tort*.—By the County Courts Act, 1919, s. 1, substituting new provisions for those contained in s. 65 of the County Courts Act, 1888, in any action in the High Court on contract or on tort, where the amount claimed or remaining in dispute does not exceed £100, and whether the action could or could not have been commenced in a county court, either party may apply to the Master to transfer it to a county court for trial ; and the Master may thereupon, if he thinks fit, order the action to be transferred accordingly (pp. 679–680).

(b) *Tort*.—And by the same section of the Act of 1919, substituting new provisions for those contained in s. 66 of the earlier Act, in any action in the High Court founded on tort, whatever be the amount claimed, the defendant may, if he can show on affidavit that the plaintiff has no visible means of paying the costs should he fail in the action, apply to the Master to transfer the action to a county court ; and the Master thereupon may, if he thinks fit, unless the plaintiff can satisfy him that he has such means, order that the action be transferred to a county court, unless the plaintiff gives security for the defendant's costs.

*Discovery*.—Within certain limits, a litigant is allowed, before the trial, to see certain documents which are within the possession or power of his opponent, and to find out certain facts which are within his opponent's knowledge. The former of these powers is often called 'Discovery of Documents' ; the latter 'Discovery of Facts.'

If any document is referred to by a party in any of his pleadings, or in any affidavit or answers to interrogatories sworn by him or on his behalf, it must, as a rule, on notice being given, be produced for the

inspection of the other party giving the notice. In this way a defendant will sometimes be able to obtain inspection of some of the plaintiff's documents even before delivering his defence, on the ground that they are referred to in the statement of claim. But, in addition to this limited right of DISCOVERY, each party is usually entitled to general inspection of all documents in the possession or power of his opponent, which relate to any of the matters in question in the action.

Application for general discovery of documents is usually made on the summons for directions; and, in a suitable case, an order is made by the Master directing each party to make discovery on oath after delivery of the defence. Discovery is made by an affidavit of documents, in which the party sets out in two schedules to the affidavit three lists of documents. The first schedule is divided into two parts; the first part containing a description of all the material documents in his possession which the party is willing to produce, and the second part containing those documents which he objects to produce. In the second schedule are set out those documents which the party once had, but no longer has, in his possession. The grounds of objection to produce the documents described in the second list must be stated in the body of the affidavit. It must clearly be understood that all material documents must be enumerated in the schedules to this affidavit, even though the party making the affidavit may object on proper grounds to produce some of them. The validity of his objection is for the Court to determine.

The following classes of documents are usually privileged from inspection: (i) written communications passing between the party and his solicitor or other legal professional adviser in his professional



capacity, or between his solicitor and counsel, for the purpose of legal advice or assistance, whether litigation is pending or not ; (ii) documents which have been prepared solely for the purpose of litigation, such as proofs of witnesses, instructions to counsel, briefs, or written statements prepared by any servant or agent of the party for the use or assistance of the solicitor in advising in the conduct of existing or contemplated litigation (not necessarily *the* litigation in which the question of privilege has arisen) ; (iii) documents of title to any property, if they contain nothing which can assist in establishing the alleged title of the opponent ; (iv) documents not in the sole legal possession of the party or held by him on behalf of some other person, for instance, as agent or trustee ; (v) documents which would tend to incriminate the party producing them ; (vi) documents the production of which is contrary to public policy or detrimental to the public service. The validity of the claim of privilege is usually decided upon the application of the other party to a Master for an order compelling his opponent to produce the documents in his possession or power.

The affidavit of documents, if drawn up in proper form, is *primâ facie* evidence that the party making it has no other relevant documents in his possession ; but the other party, if dissatisfied with it, has two courses open to him. (i) He may apply to the Master for an order for a 'further and better affidavit' ; on the ground that the opponent has omitted certain documents which are referred to in the documents disclosed, or in the pleadings, as being or having been in his possession. Or (ii) he may make an affidavit stating that in his belief the other party has, or has had, in his possession, custody, or power, certain particulars and relevant documents or classes of documents, which he must specify or indicate in his

affidavit and application ; and he may apply to the Master for an order requiring the other party to state by affidavit whether any of the documents thus specified or indicated are in his possession, custody, or power, or, if they have at any time been in his possession, custody, or power, when he parted with them, or what has become of them.

After making an affidavit of documents, the deponent must give the other party inspection of those the possession and relevancy of which he has admitted, and for which he has not claimed privilege ; and must give or allow copies to be made of any of the documents so inspected.

*Notice to produce documents.*—As a general rule, the contents of a private document can only be proved at the trial by production of the original. A party, therefore, who intends to rely on a document in the possession of his opponent, must serve him before the trial with a notice to produce it. If at the trial the party refuses to produce a document which he has had notice to produce, the party relying on the document is allowed to prove its contents by what is called secondary evidence—that is, by means of a copy, or even by oral testimony.

*Notice to admit.*—If the original of the document is in the possession of the party relying on it, not only should it be referred to in his affidavit of documents, but notice to inspect and admit it ought to be given to his opponent before the trial ; or the costs of proving the authenticity of the document may be disallowed. If the document relied on is in the possession of a stranger to the action, who is within the jurisdiction, he should be served with a *subpœna duces tecum*, summoning him to attend at the trial and produce the document.

*Interrogatories.*—Closely akin to discovery of documents is the practice of administering INTERRO-

GATORIES, whereby discovery of facts may within certain limits be obtained. Interrogatories are written questions which the opposite party is required to answer on oath, to the best of his knowledge, information, and belief. Leave to administer them must be obtained from the Master, upon the summons for directions or on notice under the summons; and a copy of the proposed interrogatories must be supplied to the other side, and another submitted to the Master, so that, on the application for leave, any objections to them may be dealt with.

The object of interrogatories is to obtain information on material facts which are within the knowledge of the opposite party and not of the party interrogating, or to obtain admissions which will save the expense of calling witnesses, or to ascertain with greater precision the case which the other side intends to set up at the trial. The Master, in deciding whether to allow the particular interrogatories proposed, will consider whether their object can, more conveniently or at less expense, be attained by other means; and he will take into account any offer made by the opposite side to deliver particulars, or make admissions, or produce documents relating to the subject-matter of the interrogatories.

On the application for leave to administer interrogatories, or in the answers to those allowed, the party interrogated may take objection to them, on a variety of grounds, in addition to objections similar to those already mentioned (pp. 520-521) in connection with the production of documents for inspection, where they apply. The objections most frequently made are, that the particular question objected to is directed to facts which are not relevant to the matters in issue, or is oppressive or vexatious, or is 'fishing,' *i.e.*, is put with reference to facts which may possibly have occurred but are not definitely alleged, on the chance

of discovering something which may assist the party interrogating to make out some case against his opponent. It is also an objection that the question seeks to discover not merely facts, but the evidence by which they are intended to be proved.

If interrogatories are allowed, and are insufficiently or evasively answered, the party interrogating may, on application to the Master, obtain an order for 'further and better answers,' or even for a *vivâ-voce* examination. At the trial, the party by whom the interrogatories have been administered, may put in all or any of the answers as evidence, or rely on them for purposes of cross-examination; but, if he relies on part of an answer, he must put in the whole of it.

*Security for costs.*—The general principle is, that a defendant cannot compel a plaintiff to give security for costs; but there are exceptions to this rule. Thus (i) if the plaintiff is ordinarily resident out of the jurisdiction, he may be ordered, upon the defendant's application, to give security for the costs of the action; similarly, (ii) if he is an insolvent person suing, as nominal plaintiff, for the benefit of a third party; and (iii) a limited company in liquidation will, *primâ facie*, be ordered to give security. But the mere fact that the plaintiff is insolvent or without visible means, or is a married woman without separate estate, is not sufficient ground for granting the application; though, as we have seen (p. 519), lack of visible means to pay costs may be a ground for the transfer to a county court of an action in tort. A defendant who is not counter-claiming cannot be compelled to give security for the plaintiff's costs.

*Interlocutory costs.*—The Master has full power to deal as he thinks fit with the costs of any application made to him. If (i) the application is a proper one, the costs of it are usually made 'costs in the cause'; which means that they will have to be paid by the



party who is condemned at the trial in the costs of the action. If (ii) the application is not a proper one to make, the Master may dismiss it 'with costs'; in which case the other party will be entitled to immediate taxation and payment of the costs occasioned by the application. Or (iii) he may order the costs to be one party's 'costs in any event'; in which case the other party will ultimately have to pay them after final taxation, even though he succeeds in the action. Or (iv) the Master may order the costs to be one party's 'costs in the cause'; which means that, if the other party succeeds in the action, he will have to bear his own costs of the application, but if he fails, he will have to pay his opponent's costs of it, in addition to bearing his own. (v) The Master may, however, reserve to the Judge at the trial the question of the costs of any interlocutory proceedings.

*Appeal in interlocutory matters.*—An appeal lies as of right, from any order of a Master, to the Judge in chambers; even where the Master's order only affects costs. With leave from the Judge or from the Court of Appeal, an appeal lies from the Judge in chambers to the Court of Appeal, in all matters of practice and procedure. In a few cases, an appeal lies from the Judge in chambers without leave; as, for example, from an order refusing unconditional leave to defend. And, in some other cases, there is no appeal, even with leave; as, for example, from an order of a Judge giving unconditional leave to defend (Judicature Act, 1894, s. 1). An appeal lies to the House of Lords from an interlocutory decision of the Court of Appeal, without leave (*Ford's Hotel Co. v. Bartlett* [1896] A. C. 1).

An appeal from an interlocutory order is by motion, of which four days' notice must be given; and the appeal must, except by special leave of the Court of Appeal, be brought within fourteen days from the date

of the order appealed from. The appeal may be, and usually is, heard by two Judges.

*Commercial cases.*—In 1895, the Judges of the Queen's Bench Division, acting under powers conferred by the Judicature Act, 1873, enabling them to make arrangements for the disposal of business in their Division, issued a notice containing certain provisions, made in accordance with the existing Rules of Practice, for the despatch of commercial business (see Introduction to Vol. I. of *Reports of Commercial Cases*, and Notices as to Commercial Causes in the *Yearly Practice*). The effect of the notice was to create in the division a court which is generally called the 'Commercial Court,' in which a Judge of the division, familiar with mercantile law and the methods of business men, sits for the disposal and trial of commercial causes.

Although the Judge is bound by the rules of evidence and procedure applicable to every division of the High Court and to every court of any division, these rules are so applied as to secure, as far as is practicable, the speedy and economical trial of commercial actions.

If it is desired that an action should be tried in the Commercial Court, the writ should be issued out of the King's Bench Division in the ordinary way, and an application be made by summons to the Judge of the Commercial Court to transfer the action to the Commercial List. The application may be made by the plaintiff or the defendant, at any time after the service of the writ; and if the action is a commercial cause, the Judge has a discretionary power to grant or refuse the application.

If an order for transfer is made, the action is placed in the Commercial List, and the words 'Commercial List' thenceforward appear upon all the papers in the action, while interlocutory matters pass out of the hands of the Master, and the summons for directions,

and all subsequent applications under it, are heard by the Judge in court, instead of by the Master in chambers, as in an ordinary action in the King's Bench Division. The main object of proceedings in the Commercial Court is, that the Judge (and, to some extent, the same Judge) should have the control of the action as soon as possible after its commencement, and of all its stages, down to and including the trial, and give such directions as will enable him to dispose, with as little delay and expense as possible, of the real controversy between the parties. The Judge is supplied from a rota containing three or more names of Judges of the King's Bench Division, each in turn sitting in the Commercial Court for two or three months at a time. The frequent applications made to a Master in an ordinary action, which often cause expense or delay not commensurate with the benefit derived by the litigant from their results, are discouraged in the Commercial Court. Thus, pleadings may be dispensed with where the facts are substantially undisputed; and the action is then ordered to be tried on mutual admissions, or on a joint statement of facts. The pleadings are described as *points of claim* or *points of defence*, to emphasise the desire (not always however realised) for brevity and conciseness of pleading; and applications for particulars are not encouraged. When the case involves a question of law which may dispose of the whole action, it is frequently ordered to be tried as a preliminary point of law. Instead of the ordinary affidavit of documents, an order is usually made that the solicitors for the respective parties prepare *lists of documents*, exchange the lists, and give inspection of the documents set out in their respective lists. In actions, however, against underwriters on policies of marine insurance, the plaintiff is generally required to make an *affidavit of ship's papers*, which is more

stringent in form than an ordinary affidavit of documents. Interrogatories are rarely allowed in the Commercial Court.

To avoid the expense of proving documents strictly, or of examining witnesses abroad on commission, or of calling witnesses to prove facts which are not seriously disputed, the parties to an action are encouraged to admit as evidence documents or affidavits which would be inadmissible except by consent, and to make admissions of facts. Pressure may be indirectly brought to bear upon a party to make such admissions, by means of the discretionary power of the Judge to order him to pay the costs occasioned by his refusal to make admissions which the Judge at the trial, after hearing the evidence, considers that he ought to have made. A day is fixed for the trial; in order that the parties and their witnesses may make their arrangements for attendance, and be saved the inconvenience of uncertainty as to the date when the case will be reached. When a commercial cause is tried by a Judge with a jury (which does not happen very often), the jury is summoned from the City of London, and is usually a special jury.

*Trial of an action.*—At the TRIAL or HEARING of the action, the plaintiff has, as a rule, the right to begin; because on him usually lies the burden of proving at least one of the facts which are necessary to entitle him to the relief claimed and are not admitted in the defence, *e.g.*, the amount of unascertained damages claimed. If the action is to be tried with a jury, the jury is called and sworn. The calling consists of drawing out the names of the jurors on the jury panel, and calling them over in the order in which they are drawn; and the twelve persons whose names are first called, and who appear, are sworn as the jury. But before they are sworn, they are liable to be challenged



by either party on a variety of grounds ; though in civil cases the right of ' challenge ' is not often exercised, and when exercised it is limited to objecting to individual jurors on suspicion of bias or partiality. If a sufficient number of jurymen have not appeared when the panel is exhausted, either party may pray a *tales de circumstantibus* ; whereupon any qualified persons who happen to be present may be made to act. When the jury is ready, the pleadings are opened, usually by the junior counsel for the plaintiff, with a brief statement of their effect ; and then the case is opened, usually by the plaintiff's leading counsel, with a statement of the facts relied on and the evidence intended to be produced in their support, and an explanation of the issues to be decided.

After the opening statement is finished, the evidence for the plaintiff is produced ; and, when this has been done, the case is opened on behalf of the defendant, and, if evidence is produced in support of the defence, his counsel is entitled to sum it up. The plaintiff's counsel, if he began, is then heard by way of reply : but no reply is allowed, except on behalf of the Crown, unless witnesses have been called or documents put in for the defence. If the defendant does not call any witnesses or put in any documents, counsel for the plaintiff sums up his evidence at the close of the plaintiff's case ; and then counsel for the defendant replies. Before dealing with the rules of evidence it will be convenient (though not in chronological order) to dispose of verdict and judgment.

When the action is tried with a jury, no mention must be made of the amount of damages claimed, or the fact that money has been paid into court ; and no facts must be stated by counsel which are not admitted or intended to be proved.

After the speeches of counsel, the Judge, if the action is tried without a jury, delivers JUDGMENT ; and

if the action is tried with a jury, he sums up the case to them, and the jury then considers its VERDICT. If the jurors cannot all agree on the verdict, they are discharged; and then a second trial before a fresh jury will be necessary, unless the parties consent to accept the verdict of a majority.

The Judge may leave the jury to return a *general verdict* for the plaintiff or for the defendant; or he may direct a *special verdict*, by putting to the jury certain questions to answer. In the latter case, he afterwards decides what is the legal result of the answers. When the damages claimed are unliquidated, they are assessed by the jury. The Judge then gives JUDGMENT according to the findings of the jury, and decides all questions with regard to costs. If the defendant is unsuccessful and desires to appeal, an application may be made for a stay of execution, *i.e.*, for an order that the judgment given against the defendant shall not be enforced by seizure of his goods or other compulsory means. If this application is granted, it is usually granted on the terms of payment of money into court or to the plaintiff, and of notice of appeal being given within a fixed time, and, as regards costs, that they be taxed and paid to the successful party's solicitor, on his undertaking to return them, if so ordered by the Court of Appeal.

*Evidence.*—The facts relied upon by either party in support of his claim or defence must, if not admitted by his opponent, nor presumed by the court in his favour, be proved by him by evidence. Some of the facts may be admitted in his opponent's pleading, others may have been admitted in pursuance of a notice to admit, in order to save the costs of proving them; or, if the only issue in the action is a question of law, the parties in some cases agree upon a statement of facts, and so avoid the necessity of calling any evidence at all.

A litigant need not prove any fact which the law presumes in his favour ; unless his opponent adduces evidence to the contrary. Thus, for example, in an action for libel, the plaintiff need not prove that the words are untrue ; except to rebut evidence given by the defendant in support of a plea of justification. In an action on a bill of exchange, the holder is *primâ facie* deemed to be a holder in due course, and (until the burden of proof is shifted by the proof of fraud, duress, or illegality) need not prove that he gave value for it. And the child of a married woman is presumed to be legitimate in the absence of clear proof to the contrary.

There are also certain facts of which the Court will take judicial notice, and of which evidence therefore is not required ; such as the public statutes, all Acts of Parliament passed since 1850 in the absence of provision therein to the contrary, customs settled by judicial decision, public matters connected with the government of the country, matters of common and certain knowledge, such as the meaning of common words and phrases, and events which must happen in the ordinary course of nature.

Subject to these, and a few similar, exceptions, all facts relied on must be proved by the parties by oral or documentary evidence. The only facts which can be relied on, and to which therefore the evidence must be confined, are the facts *in issue* on the pleadings, or other facts which are *relevant* to them ; that is to say, which tend to prove or disprove the facts in issue on which the claim or defence is based. Any other fact is irrelevant to the issue ; and evidence tendered to prove it is inadmissible. Thus, in an action for damage by negligence on a particular occasion, the fact that the defendant has been careless on other occasions would be irrelevant. Evidence in chief to prove the character of either party is inadmissible, as being irrelevant ; unless the character of the party

is a fact directly in issue, as in an action by a servant for wrongful dismissal, or in an action for libel or slander, or is relevant to the question of damages, as in actions for breach of promise of marriage or for seduction. In actions for libel or slander, in which the defendant has not pleaded justification, he cannot, without leave of the Judge, give evidence in chief of the plaintiff's bad character in mitigation of damages ; unless he has, at least seven days before the trial, given the plaintiff particulars of the facts which he intends to prove.

*Oral evidence.*—Oral evidence is given by witnesses examined on oath or affirmation before the Court, or out of court before an official examiner or on commission, if, owing to illness or absence abroad, the witness cannot attend the trial. In civil cases, every person is now competent to give evidence ; unless, owing to infancy, unsoundness of mind, or drunkenness, he is, in the opinion of the Judge, unable to understand the nature of an oath, or the duty of speaking the truth, or to give rational testimony. The attendance at the trial of any witness, who is within the jurisdiction, can be secured by serving him with a writ of *subpœna ad testificandum*, or, where he is required to bring documents with him, by a *subpœna duces tecum* specifying the documents, and by paying or tendering him a sum to defray his reasonable expenses of attendance. If he fails to answer, when called on his *subpœna*, he is liable to be fined or imprisoned for contempt of court, and also to an action for damages at the suit of the party who subpœnaed him.

*Examination-in-chief.*—There are certain kinds of questions which, as a general rule, ought not to be put to a witness in examination-in-chief, *i.e.*, the first examination by counsel for the party on whose behalf he is called, and which, if put, can be properly objected to.



(1) No question can be put to elicit a fact which is not within the personal knowledge of the witness. Thus, it is generally inadmissible to ask a witness what another person, whether living or deceased, has told him orally or in writing. Such evidence is called *hearsay*, and is objectionable, because the person who is alleged to have made the statement, did not make it on oath, and cannot be cross-examined; and because there is always a danger of inaccuracy in the repetition of a statement. To the general rule that evidence is inadmissible of a statement made by a person not called as a witness, there are many exceptions, of which the following should be noticed: (i) a statement made in writing by a deceased person is admissible, if the whole or part of it was against his pecuniary or proprietary interest—as, for example, an entry in his cash-book that he received money in payment of a debt due to him—or was an entry made in the usual course of business of a transaction done by him; his duty being both to do the act recorded, and to record it at or about the time of doing it; (ii) declarations by a deceased person upon questions of pedigree, or as to public rights or customs, are generally admissible to prove their existence or non-existence; (iii) a statement made by the opposite party, or by an agent with his express or implied authority, may be given in evidence *against* him as an admission.

(2) No question is admissible which is put to elicit a fact which is not relevant to a fact in issue in the action.

(3) No question is admissible which is put to elicit the opinion of the witness on facts from which it is the function of a jury to draw their own inferences; but the opinion of experts is admissible on matters requiring special skill or experience.

(4) No question is admissible which is put with the object of adding to, subtracting from, varying, or

contradicting, the terms of a written document. But there are certain exceptions to and modifications of this rule, which have already been mentioned (pp. 80-81).

(5) No 'leading' question, that is to say, no question which is put in such a form as to suggest to the witness the answer he is desired to give, is, strictly, admissible in examination-in-chief. But leading questions may properly be asked with reference to facts which are merely introductory, *e.g.*, the name, address, and occupation of the witness, or are not disputed, or to contradict directly a fact sworn to by another witness, or to identify a person or thing.

*Cross-examination.*—A witness examined by one party may always be cross-examined by the other party. In cross-examination, more latitude is allowed with regard to the kind of questions which may be put to the witness. The objects of the cross-examiner are to weaken his opponent's case, by showing that the evidence of the latter's witnesses is untrustworthy, or to establish his own case by obtaining admissions from the witnesses called by his opponent; and it is his duty to indicate in his cross-examination what facts deposed to by the witnesses in examination-in-chief he disputes, and to put to each of them in turn so much of his own case as the particular witness is in a position to admit or deny. In cross-examination, therefore, questions may be put to elicit facts which, though not relevant to any fact in issue, tend to discredit the witness, by showing grounds for doubting his accuracy or his honesty. Thus, in cross-examination, a witness may be asked any 'leading' question, or any question to show his bias or interest in the action, or that he has, on a previous occasion, made statements inconsistent with the evidence he has given, or that he has been convicted of any crime.

But where a question is put to elicit a fact which is merely relevant to the credit of the witness, and not

to any fact in issue in the action, the answer of the witness is final, and no evidence can afterwards be called to contradict it; otherwise the case might branch out into all kinds of irrelevant inquiries. To this rule there is, however, the exception that, where a witness has, in cross-examination, denied bias, or that he has made a previous inconsistent statement, or that he has been convicted of a crime, evidence may afterwards be given to contradict his denial. Where the witness denies having made a previous inconsistent statement, then, if it was oral, the circumstances in which it was made must be mentioned to him, so as to give him an opportunity of remembering the occasion; and, if it was made in writing, his attention must be called to the document, before it can be put in evidence to contradict him.

A conviction of crime, denied by the witness, may be proved by a certificate containing the substance of the indictment or conviction, or, in the case of a summary conviction, by production of a copy of the conviction.

There are certain questions which, though allowed to be put, the witness is not bound to answer; such as any question which tends to show that he has committed a crime (of which he has not been convicted), or which seeks to obtain the disclosure of any communication between husband and wife, or between legal adviser and client. But there is no similar privilege in the case of communications between a spiritual or medical adviser and his penitent or patient.

*Re-examination.*—A witness, who has been cross-examined, may be re-examined by the party who called him; but he cannot, except by the Judge or with leave, be asked any question which does not arise out of his cross-examination. The object of re-examination is to explain more fully any matter

referred to in cross-examination, or to give the witness an opportunity of explaining any inconsistency or mistake in the answers given by him in cross-examination.

*Documentary evidence.*—Documentary evidence must, as a general rule, be proved by production of the original documents in court at the trial. To this rule there are several exceptions, which may be broadly summarised as follows.

(i) The contents of a public document may usually be proved by a certified copy, signed by the official who has the custody of the original. (ii) The contents of a judicial document may usually be proved by an *office copy*, made by the officer of the court who has the custody of the original. (iii) Under the Bankers' Books Evidence Act, 1879, an entry in a banker's book may be proved by an examined copy, produced by a clerk from the bank who has examined it with the original. (iv) The contents of a private document may be proved by a copy, or even by the oral testimony of a witness who can speak to its contents from memory, in the following circumstances : if the original has been lost or destroyed ; or if it is in the possession or control of the opposite party, and he refuses or is unable to produce it when called for at the trial (after having been duly served with a notice to produce it) ; or if the original is in the possession of a stranger to the action and is a privileged document which he is not legally bound to produce (such as a title-deed), and he refuses to produce it after being duly served with a *subpœna duces tecum*. (The cases (i), (ii), and (iv) above mentioned are illustrations of *secondary evidence*.) A private document, if required by law to be attested, must, unless it is thirty or more years old and it comes from a 'proper' custody, that is, from a person in whose custody, and from a place where, one would naturally expect the document to come from, or its



due execution is admitted, be proved by calling an attesting witness, or, if no attesting witness can be found within the jurisdiction, by calling some person to prove the signature of one or more of the attesting witnesses. A private document, which is not required by law to be attested, must, unless admitted, be proved by proof of the handwriting and signature of the person who executed the document ; and, if the document is a deed, the sealing and delivery must be proved.

*Costs.*—Where the action is tried *with a jury*, the COSTS *primâ facie* follow the event, and need not be applied for ; and the successful party is entitled to recover his costs of the action, unless (i) the Judge before whom the action is tried otherwise orders for ‘good cause,’ or (ii) the action is one which could and ought to have been brought in a county court. (i) Thus, the Judge may make a special order depriving a successful plaintiff of his costs, where the jury, by awarding contemptuous damages, has indicated its view that the action should not have been brought, or where the plaintiff has acted frivolously, or vexatiously, or oppressively, in bringing the action ; or, if the plaintiff has been guilty of gross misconduct, he may even be ordered, though successful, to pay the defendant’s costs. For ‘good cause,’ even a successful defendant may be deprived of his costs ; but he cannot be ordered to pay the whole of the costs of the action. There is no appeal from the refusal of the Judge to make an order depriving the successful party of his costs ; but if he does so deprive him, an appeal lies to the Court of Appeal on the question whether any ‘good cause’ did exist. If no such cause existed, the Judge had no power to make the order, which will, accordingly, be reversed ; but if there was ‘good cause,’ the Court of Appeal will not interfere with the way in which the Judge has exercised his discretion.

(ii) If the action is of the kind which could have been brought in a county court, then, unless the Judge certifies that there was sufficient reason for bringing it in the High Court, or that the defendant objected to the transfer of the action to a county court, the plaintiff, though successful, will be entitled to no costs, or to costs only on the county court scale, according to the nature of the action and the amount recovered (County Courts Act, 1919, s. 11). In an action of contract a successful plaintiff is not entitled to any costs if he recovers less than £40; and is entitled to county court costs only, if he recovers £40 or over, but less than £100. But a plaintiff in an action of contract who obtains judgment for £20 or upwards under Order XIV. (p. 493), within twenty-one days of the service of the writ or such further time as the Court may order, is entitled to costs on the High Court scale. In an action of tort, a successful plaintiff is not entitled to any costs if he recovers less than £10, and is entitled to county court costs only, if he recovers £10 or over, but less than £50.

If the action is tried *without a jury*, the Judge has full power to deal with the costs as he, in his discretion, considers fair and just between the parties. No appeal lies from his order, if made in the exercise of his discretion; but the discretion must be exercised judicially, *i.e.*, not capriciously, but upon some reasonable principle. As a general rule, the costs of the action follow the event, in the absence of any special reasons for ordering otherwise; and, where a person successfully and without any misconduct enforces a legal right, it will not be easy to justify an order depriving him of his costs (*Civil Service Society v. General Steam Navigation Co.* [1903] 2 K. B. 756). Where there are distinct issues raised in the action, the party in whose favour final judgment

is entered usually gets the general costs of the action, but is ordered to pay the costs of the issues on which he has not succeeded.

The order almost always directs that the costs shall be taxed. The solicitor for the party who has obtained an order for costs, delivers his bill of costs, which is then taxed by a Master, who, after hearing the objections of the other party, disallows or reduces such items as he considers unreasonable or excessive. As a rule, the amount allowed on taxation is all that can be recovered by the successful party; and he has to pay his own solicitor the extra costs disallowed on taxation, in so far as they are reasonable and proper charges as between himself and the solicitor. The Judge cannot (in matters usually dealt with in the King's Bench Division) award that costs to be taxed as between solicitor and client shall be paid by the other side; unless there is an express statutory provision enabling him to do so.

If the costs of any interlocutory proceeding, such as the costs of a commission to take evidence abroad, have been left by the Master to be dealt with by the Judge at the trial, an application for such costs must be made immediately after judgment is delivered; otherwise they will not be allowed on taxation, but will have to be borne by the party who incurred them.

*Execution.*—Execution is the process by which a judgment is enforced. There are many modes of execution; but the following are those usually adopted to enforce a judgment for the payment of money.

(1) Writ of *fiery facias*.—This is the most common form of execution; and it is directed against the goods and chattels of the judgment debtor (O. XLIII.). The writ (commonly called a writ of *fi. fa.*) is addressed to the sheriff, and authorises him to seize and sell sufficient of the goods and chattels of the judgment debtor, to satisfy the amount of the judgment,

together with interest at the rate of four per cent. Under this writ, the sheriff may sell a lease belonging to the debtor, or his growing crops, but not any freehold interest, nor fixtures, nor any equitable interest in land or goods, unless (at any rate in the case of goods) the whole beneficial interest is vested in the judgment debtor. Under the Judgments Act, 1838, the sheriff may take under a writ of *fi. fa.* any money, bank-notes, bills of exchange, or other securities for money, belonging to the judgment debtor, and may sue upon them in his own name, and pay over to the judgment creditor the money which he recovers. The wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of the debtor's trade, are exempted from seizure; if their total value does not exceed five pounds.

When goods seized by the sheriff are claimed by a third party, the sheriff usually seeks the protection of the court by taking out an INTERPLEADER SUMMONS (O. LVII.), which is served on both the claimant and the execution creditor, and calls on them to appear in chambers and state the nature and particulars of their claims, and either to maintain or abandon them. On the hearing of this summons, the Judge or Master may (amongst other courses open to him) dispose of the merits of the rival claims to the goods, and decide them in a summary manner, or direct an issue to be tried between the claimant and the execution creditor, for the purpose of determining which of them is entitled to the goods, or, in certain cases, transfer the proceedings to a county court. (For cases in which the debtor is made bankrupt, see p. 650).

(2) Writ of *elegit*.—Under this writ, the sheriff can deliver to the judgment creditor all land, including leaseholds, legally in the possession of the judgment debtor, or held solely in trust for him under a bare trust, until the judgment is satisfied. Thereupon the



judgment creditor becomes *tenant by elegit* and can, if he wishes, by taking appropriate steps obtain possession of the land; or he may, after a writ or order for enforcing the judgment has been registered, apply, by originating summons in chambers in the Chancery Division, for an order for the sale of the debtor's interest in the land. Formerly goods also could be seized under a writ of *elegit*: but, since the Bankruptcy Act, 1883, the writ no longer extends to goods. To be effective, the writ must be registered at the Land Registry, in manner described in a previous volume (Vol. II., pp. 459–460).

(3) *Garnishee order*.—Debts due to the judgment debtor cannot be seized under a writ of *fiery facias*; but they may be attached by means of garnishee proceedings (O. XLV.). The judgment creditor may obtain, on *ex parte* application to the Master in chambers, an order that any debt owing from any person within the jurisdiction who is indebted to the judgment debtor, and who is called the *garnishee*, be attached to answer the judgment, together with the costs of the garnishee proceedings, and that the garnishee appear in chambers and show cause why he should not pay to the judgment creditor the debt due from him to the judgment debtor. This order (called a 'garnishee order *nisi*') must be served on the garnishee, and also on the judgment debtor. As soon as it is served, it binds the debt in the hands of the garnishee; and he must not pay his debt to the judgment debtor. The order attaches all debts 'owing or accruing' from the garnishee to the judgment debtor, even though the total sum may be in excess of the judgment debt. Thus, for instance, a banker who is served with a garnishee order *nisi* in respect of a judgment debt owed by his customer is not bound, until the order *nisi* has been made absolute and has been satisfied, to honour the customer's cheques although there may be a balance

standing to his credit in excess of the judgment debt ; indeed, he would do so at his peril (*Rogers v. Whiteley* [1892] A. C. 111 ; see p. 152 of this volume). Payments of salary, dividends, and similar debts are not attachable until they become due ; and there are some debts which on grounds of public policy have been made incapable of attachment (see, for instance, those mentioned on p. 226).

The garnishee must appear, if he disputes his liability ; or he may pay the debt into court, or execution may be issued against him to enforce payment ; but it is not considered safe for him to pay the judgment creditor until the order *nisi* has been made absolute. If the garnishee appears, and disputes his liability, the Master may direct an issue to be tried between him and the judgment creditor for the purpose of deciding his liability. Payment by a garnishee into court after service of the order *nisi*, or to the judgment creditor when the order has been made absolute, is a valid discharge of his debt to the judgment debtor.

(4) *Charging order*.—On the application of the judgment creditor to the Master or Judge in chambers, an order may be made charging stock or shares belonging to the judgment debtor with payment of the amount of the judgment debt (O. XLVI.). The order must be served on the company, bank, or corporate body, whose stock or shares are charged ; and its effect is to prevent the judgment debtor from transferring such stock or shares until the order is discharged. The creditor, after obtaining the order, may obtain a *stop order* on the dividends or interest payable to the debtor ; and he may bring a separate action in the Chancery Division to obtain an order for the sale of the stock or shares comprised in the charging order. A fuller description of charging and stop orders will be found in the following chapter, in

connection with the proceedings in the Chancery Division, where they are more familiar (pp. 582-585).

(5) *Receiver*.—In cases where the debtor has an equitable interest in land or other property, which cannot be taken in execution by any of the modes above mentioned, but which is properly available for payment of his debts, an order may be obtained appointing a receiver to receive the debtor's interest in the property and so make it available for satisfaction of the judgment. This is commonly called 'equitable execution' (pp. 582-585).

(6) *Possession of land or chattel*.—A judgment for the recovery of land is enforced by a *writ of possession* (O. XLVII), by which the sheriff is ordered to enter on the land, and cause the person named in the writ to have possession of it without delay. This must not be confused with the seizure of land under a writ of *elegit* already described, which is a means of satisfying a judgment for the payment of a sum of money. A judgment for the recovery of a chattel may be enforced by a *writ of delivery* (O. XLII., r. 6; O. XLVIII.), by which the sheriff is ordered to distrain defendant by all his lands and chattels, till he delivers the particular chattel. If it is intended that the defendant should have the option either of restoring the chattel or paying its value, the plaintiff applies for a writ of delivery; if the plaintiff seeks to recover the particular chattel detained without giving the defendant that option, he applies for a writ of delivery *absolute*, and, if the defendant still refuses to deliver, a *writ of assistance* may be obtained to enable the sheriff to seize the chattel. It is not essential that the value of the chattel should have been assessed before a writ of delivery absolute is issued (*Hymas v. Ogden* [1905] 1 K. B. 246).

(7) *Attachment and committal*.—A judgment directing the defendant to do some specific act other than to

pay money, or to abstain from doing some act, may be enforced by a writ of attachment or order of committal. The need for these remedies occurs more frequently in the Chancery Division; and they will be more conveniently discussed in the later chapter relating to that Division (pp. 579–582).

(8) *Sequestration*.—A judgment or order to pay money into court, or to do any other act in a limited time, may also be enforced by a writ of sequestration against the rents and profits of any real estate, and against all the personal estate, of the person who disobeys the order (O. XLIII., r. 6). The writ is directed to persons called sequestrators, and authorises them to enter on the lands of the disobedient person and receive the rents and profits, and to take possession of his personal property until he obeys the order; and, by leave of the court, the sequestrators may sell the personal property, and pay the proceeds into court, to be dealt with as the court may direct.

*Appeal*.—An appeal, or application for a new trial, or to set aside a verdict, finding, or judgment, lies to the Court of Appeal from every final judgment of the King's Bench Division on any question of law or fact, whether the trial was with or without a jury (O. XXXIX. and LVIII.). The appeal or application in all cases is by notice of motion, which must state whether the whole or part only, and, if part only, what part of the verdict, finding, or judgment, is complained of. Where the trial was with a jury, the notice must also state the grounds of the application; but where the trial was without a jury it is not necessary to ask specifically for a new trial, or to state the grounds of the application. The notice of motion in the case of a final judgment is a fourteen days' notice, and must be served within six weeks from the trial, or, where the trial has been adjourned for further consideration, within six weeks after judgment has been given on



such further consideration ; but the Judge giving the judgment, or the Court of Appeal, has power to extend the time beyond six weeks.

The grounds for the application for a new trial are generally one or more of the following : (1) that the Judge misdirected the jury ; (2) that the verdict was against the weight of the evidence, or that there was no evidence to go to the jury ; that is to say, that the verdict was perverse, and such that no reasonable men could on the evidence have found, or that the evidence was insufficient to make out a *primâ facie* case for the defence, and should not have been left by the Judge to the jury, or that the conduct of the jury or their verdict was irregular for any reason, such as that they tossed up a coin or drew lots to relieve them of their duty to form a decision ; (3) that the damages are excessive or inadequate, that is to say, so large that no reasonable men could have given them, or so small that the jury must have left entirely out of consideration some substantial element of damage, or made some mistake in calculating the figures ; (4) that the Judge wrongly admitted or rejected material evidence ; or (5) that fresh and conclusive evidence has been discovered since the trial, which could not reasonably have been discovered before it. But there can be no direct appeal from the verdict of a jury.

The appeal or application for a new trial must be heard by not less than three Judges, except by consent of the parties. The Court of Appeal has all the powers and jurisdiction of the High Court, and can give any judgment or make any order which ought to have been given or made in the court below. It has full discretion over the costs of the appeal ; but, as a rule, the costs follow the event. If a new trial is ordered, the costs of the first trial generally abide the order made on the second as to costs. If the judgment

of the court below is reversed, the appellant usually gets the costs of the action and of the appeal.

An appeal lies from the Court of Appeal to the House of Lords, and is brought by way of petition. The practice is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, and the Appeal (*Formâ Pauperis*) Act, 1893, and by Standing Orders made thereunder (pp. 483–484). The appellant and the respondent each lodges a printed ‘case,’ setting out shortly the nature and main facts of the dispute, and the proceedings in the courts below; summarising the judgments, and stating reasons why the judgment of the Court of Appeal should be reversed or affirmed. The cases are bound in a volume, together with an appendix, which contains the pleadings, the documents put in at the trial, the judgments delivered, and the orders or decrees made in the courts below. The appeal is heard by not less than three Lords of Appeal (p. 484), and may be heard whether Parliament is sitting or not. The appeal must be brought within six months from the delivery of the judgment appealed from. On the hearing of the appeal, each of the parties is entitled to speeches by two counsel; and the appellant’s counsel is also entitled to be heard in reply. The House of Lords may dismiss or allow the appeal, or vary the judgment appealed from; and it has full power to deal with the costs of the appeal, and of the proceedings in the courts below.

*Poor persons.*—Provision has been made (now embodied in Order XVI., rr. 22 to 31 N, to which reference should be made) for facilitating litigation in the High Court (excepting, speaking generally, bankruptcy and criminal proceedings) by a ‘poor person,’ *i.e.*, a person not worth £50 (or in special circumstances £100) and also not in receipt of an income exceeding £2 a week (or in special circumstances £4 a week). After a proper inquiry and report by a solicitor, or by counsel instructed by a solicitor, an applicant may be

admitted to take or defend or be a party to legal proceedings *as a poor person* ; and thereupon a solicitor and counsel are assigned to him from lists of persons willing so to act. Broadly speaking, a party admitted as a 'poor person' is not liable to pay court fees ; nor is he liable to pay costs to the other party if he is unsuccessful ; nor is his solicitor or counsel allowed to take any fee from him. But if he recovers any money or other property, the court may allow certain costs to be paid thereout to his solicitor.

Having now mentioned the more important proceedings in a common law action, from the commencement to the conclusion by judgment and execution thereon, or by appeal, we may summarise some of the steps or stages in the action, with the times appointed for each ; but care should be taken in each case to consult the relevant Rule.

THE STEP.	THE TIME.
Defendant's appearance to writ of summons ;	within eight days after service of writ, inclusive of the day of service.
Statement of claim—delivery of, if ordered ;	within time specified in the order, or, if no time specified, within twenty-one days from date of order.
Defence—delivery of ;	within time specified in the order, or, if no time so specified, within ten days after delivery of statement of claim ;

THE STEP.	THE TIME.
<p>Defence—delivery of ; <i>cont.</i>  but if to specially endorsed writ,—</p>	<p>within ten days from time limited for appearance to writ ; unless the plaintiff within that time serves a summons for judgment or for directions, in which case within time limited in the order, or, if no time limited, eight days from date of order.</p>
<p>Reply—delivery of, if ordered ;</p>	<p>within time limited by the order, or, if no time so limited, within four days after delivery of the previous pleading.</p>
<p>Trial, notice of—delivery of ;</p>	<p>with reply (if any), or, where no order for a reply has been made under Order XXIII., on expiration of four days after defence or last of defences has or have been delivered, or at any time after the issues are ready for trial ;</p>



THE STEP.	THE TIME.
Trial—notice of; <i>continued</i> . but if given by defendant;	after six weeks from the time plaintiff first becomes en- titled to give notice of trial;
Trial, notice of—length of;	ten days; or (if short) four days (Order XXXVI., r. 14).
New trial, notice of motion for —delivery of;	within six weeks after trial.
New trial, notice of motion for —length of;	fourteen days.
Appeal to Court of Appeal, notice of motion for— delivery of:	
(1) from any final or interlocutory judg- ment, or any final order in an action;	within six weeks;
(2) from any interlocutory order, or any order, final or interlocu- tory, in any matter not being an action;	within fourteen days;
(3) from <i>ex parte</i> refusal;	within four days.
Appeal to Court of Appeal, notice of motion for—length of:	
(1) in case of final order or final or interlo- cutory judgment.	fourteen days;
(2) in case of any inter- locutory order;	four days.

THE STEP.	THE TIME.
Appeal to Divisional Court from inferior court, notice of motion—delivery of :	within twenty-one days.
Appeal to Divisional Court from inferior court, notice of motion—length of :	eight days.
Appeal to House of Lords— petition ;	within six months.
Execution on judgment—issue of ;	within six years.

#### NOTE ON AUTHORITIES.

[Reference should be made for a more detailed treatment of the contents of this chapter to Blake Odgers, "*Pleading and Practice*," and to the Rules of the Supreme Court printed in the "*Yearly Practice*," and notes thereon.]

## CHAPTER XXVIII.

## PROCEEDINGS IN THE CHANCERY DIVISION.

WE shall now proceed to consider an action in the Chancery Division ; first, where such action is commenced by writ of summons, and secondly, where it is commenced by other means.

## I.

And first, where the action is commenced by WRIT OF SUMMONS. In this case there are, with some exceptions and additions, the same stages in the action as we have just gone through in treating of an action in the King's Bench Division ; but there are some variations of considerable importance, which we must now consider.

*Writ of summons.*—The cause must be assigned to one of the Judges of the Chancery Division, which is done by ballot in the Writ Department of the High Court before the issue of the writ ; except that where a cause or matter has been assigned to one Judge, every subsequent writ, summons, or petition, relating to the same trust or to the winding-up of the same company, or so connected therewith as to be conveniently dealt with by the same Judge, must be assigned by certificate to the same Judge (Order V., r. 9 (e)). The endorsements of claim required on every writ of summons vary with the nature of the equitable relief that may be sought, and include claims as a creditor, or as a

legatee, to have the estate of one who is deceased administered; to have the accounts of certain partnership or mortgage transactions taken; that certain trusts may be carried into execution; that a certain deed may be set aside or rectified; for the specific performance of agreements; and a great many others. But it must not be supposed that these examples by any means exhaust the business of the Chancery Division; and indeed there is high authority for the proposition, that almost any variety of action which might have been brought in the common law courts can now be brought in the Chancery Division. In particular, actions in which an injunction of some kind is claimed form a large part of the business of this division. It is specifically provided, that in all cases of ordinary account, as, for instance, in the case of a partnership, executorship, or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons must be expressly endorsed with a claim that such account be taken.

In an action of the nature usually assigned to the Chancery Division, there is no judgment for default of appearance to the writ; but if the defendant does not appear, the plaintiff files the usual affidavit of service, and his statement of claim. There being no appearance, the provisions of Order XXX. do not apply in such a case; and, consequently, no summons for directions is required. But the plaintiff may, upon the default of the defendant in delivering defence, set down the action or motion for judgment.

*Representative proceedings.*—As regards parties, one of several persons interested with others in an estate (as, for example, one of several residuary legatees, next-of-kin, devisees, persons interested in proceeds of sale of real estate or other *cestuis que trustent*) may obtain an administration judgment or order, without



serving the rest; and, conversely, any executor, administrator, or trustee, may have a judgment or order against any one legatee, next-of-kin, or *cestui que trust*. And, in all cases of suits for the protection of property, one person may, in general, sue on behalf of himself and of all others having the same interest; although the Court may require such other persons to be made parties, as it may deem proper. Also, an unknown heir-at-law, customary heir, or unascertained next-of-kin, or an unborn co-tenant, may, in any action where there is sufficient reason for not requiring such heir-at-law or other party to be first ascertained, be represented by some person or persons specially appointed by the Court, and be bound by the judgment subsequently delivered; and this, whether the action does or does not merely involve a question of construction. But a 'representation order' made in these circumstances must not be confused with a 'classification order' made under Order LV., r. 40 (p. 562). Trustees, executors, and administrators represent their respective beneficiaries, whether suing or being sued, in actions for foreclosure, or for any other relief; although the Court may at any time direct the beneficiaries to be joined as parties. An heir-at-law need not be made a party to any action to execute the trusts of a will, unless the will is to be established against him; and one or more persons out of a numerous class having the same or the like interest in any cause or matter may sue or be sued, or may be authorised to defend, on behalf of the entire class (O. XVI.) (p. 489).

*Interlocutory relief*.—Before the stage is reached at which the delivery of pleadings begins, certain interlocutory proceedings of considerable importance frequently occur. Writs specially endorsed within the meaning of Order III., rule 6 (p. 491), are practically unknown in the Chancery Division; for the reason

that actions to which such endorsements are applicable are almost invariably commenced in the King's Bench Division. Consequently, applications under Order XIV., which are so common in the latter division, are of the rarest occurrence in the former. On the other hand, interlocutory motions for temporary relief, pending the trial of the action, are of every-day occurrence in the Chancery Division; their object being, most commonly, to obtain either an injunction or the appointment of a receiver. Relief of this nature may even be granted *ex parte*, i.e., on the application of one of the parties without notice to the other (by an order commonly known as an *interim* order), in cases of extreme urgency, where the applicant can satisfy the Court that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief (Judicature Act, 1873, s. 25 (8)). But in such cases the Court usually grants relief only until the first day for which a formal notice of motion can be given. Applications of this kind may be made immediately after, but not before, a writ has been issued; and must be supported by evidence in the form of an affidavit showing a *prima facie* case of threatened injury. But, in such cases of apparent urgency, the strict rules of evidence are frequently relaxed; even to the extent of admitting a mere hearsay affidavit, e.g., that of the plaintiff's solicitor, based on a letter or telegram received from his client. The defendant, on the other hand, is protected from improper use of this process by the practice of the Court which, almost invariably, grants relief only upon the terms of the plaintiff giving an 'undertaking in damages'; whereby he is required to undertake, by his counsel, to abide by any order which the Court may make as to damages, in case the Court should thereafter be of opinion that the defendant has sustained any injury by reason of the

order made. The application for an *ex parte* order is made in open court, to the Judge to whom the writ has been assigned.

But, in all save the most urgent cases, interlocutory relief, where necessary, is obtained on ordinary motion, notice of which may, by special leave obtained *ex parte*, be served together with the writ, or, without leave, at any time, after the defendant has entered appearance to the writ; two clear days being required (in the absence of special leave to the contrary) to elapse between the service of the notice and the day named for hearing the motion. The motion must be supported by evidence given by affidavit; and the defendant usually obtains an adjournment to enable him to file evidence in opposition. But the Court may refuse such an adjournment, except upon terms; as, for example, that the defendant give an undertaking until the further hearing in the terms of the notice of motion to discontinue the acts complained of. When the evidence is complete, the Court may of course either grant the relief asked, or dismiss the motion; or, if it appear that the matter in dispute cannot conveniently be decided on affidavit evidence, or without pleadings, may order the hearing to stand over to the trial of the action. On the other hand, it may, and frequently does (especially in actions where an injunction is the principal relief claimed), appear that justice can be done by treating the motion as the final trial of the action without pleadings; and this is effected by consent of the parties, the hearing of the motion being then disposed of, or sometimes adjourned to a convenient day, either with or without the condition that either party shall be at liberty to cross-examine the witnesses who have made affidavits on behalf of his opponent. Where the motion is adjourned to the trial of the action, the costs are usually directed to be 'costs in the action,' *i.e.*, reserved

to abide the result of the trial ; and this is often the case, even where interlocutory relief is granted. As a condition of obtaining an interlocutory injunction, the plaintiff is in all ordinary cases required to give an undertaking in damages in the terms indicated above for an *ex parte* application (p. 554). Motions being heard in open court, the parties must appear either by counsel or in person ; and cannot be heard by their solicitors (O. LII.).

*Summons for directions.*—As in the King's Bench Division (p. 554), the plaintiff in an action in the Chancery Division is allowed to apply, after the defendant has appeared, for an injunction or for the appointment of a receiver ; but, before taking any further or other step, he must issue a SUMMONS FOR DIRECTIONS under Order XXX. The matters nominally included within the scope of a summons for directions in the Chancery Division are substantially the same as in the case of such a summons in the King's Bench Division (pp. 500–502), but the procedure is not the same. On the 'return' or first hearing of the summons, pleadings, to the extent of statement of claim and defence, are ordered in almost every case except where, as explained above (p. 555), a motion for a receiver or an injunction has been treated as the trial of the action. After pleadings have been ordered, the hearing of the summons is then usually adjourned generally ; and subsequently either party is at liberty, at any time before judgment, upon two clear days' notice to his opponent, to apply for any interlocutory relief upon the matter usually dealt with by notice for further directions (R. S. C., App. K., Form 4 D. 1), *e.g.*, particulars, admissions, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses (Order XXX., r. 2). In this way applications are frequently made for further and better



particulars of matters stated in an adversary's pleading, for discovery of documents, and leave to deliver interrogatories. Special directions with regard to the place or mode of trial are practically unknown, inasmuch as in the ordinary course all actions in the Chancery Division are tried by a Judge sitting in the Royal Courts of Justice in London, without a jury.

As in the King's Bench Division (pp. 515-516), any defendant may, by leave of the Court, bring into the action by means of a 'third party notice,' any person, not a party to the action, against whom he claims any right of contribution or indemnity.

*Pleadings.*—No special regulations for the Chancery Division exist with regard to pleadings; but it is obvious, that the statement of claim (and, indeed, the pleadings generally) must often, from the nature of the relief sought, be much more complicated and lengthy than is necessary in an action in the King's Bench Division. For example, in an action for specific performance, the statement of claim would allege, *e.g.*, that the defendant agreed to grant a lease to the plaintiff, and has refused to do so; and the defendant might, in such a case, state in his defence, that the plaintiff, having been let into possession, has broken one of the covenants of the proposed lease; to which the plaintiff might reply, that he never in fact broke the covenant as alleged, or that, if he did, such breach was waived by the defendant.

Here, perhaps, more frequently than in the King's Bench Division, it occurs that the defendant desires to set up a counter-claim, raising a question between himself, on the one hand, and the plaintiff and additional persons, not parties to the action, on the other. When this is the case, the defendant can join such additional persons by naming them in his defence, and serving upon them a copy of the defence, endorsed with a notice calling upon them to enter appearance

to the counter-claim within eight days after service. Any person thus made a party to the action must appear, as if he had been served with a writ of summons.

In actions to restrain infringement of patent rights—a class of action generally instituted in the Chancery Division—it is necessary to bear in mind the provisions of the Patents and Designs Acts, 1907 and 1919, which (among many other matters) require the plaintiff in an action for infringement to deliver with his statement of claim the Particulars of Breaches, and the defendant, with his defence, Particulars of Objections.

As in the King's Bench Division, the defendant may in the Chancery Division pay money into court under Order XXII. ; but such payments are of less frequent occurrence in the Chancery Division.

Under the present rules of pleadings, the plaintiff is not required to anticipate, in his statement of claim, the case of the defendant. And in default of defence, judgment may be obtained in the Chancery Division as in the King's Bench Division (p. 509).

*Trial and evidence.*—For practical purposes, it may be assumed that the plaintiff who institutes an action in the Chancery Division desires it to be tried by the only method available in that division, that is to say, by a judge sitting without a jury ; and it is expressly provided (O. XXXVI., r. 3) that all actions which are by the Judicature Act, 1873, specially assigned to the Chancery Division, shall be tried in this way. The only means by which the trial by jury of an action instituted in the Chancery Division can now be obtained is that of transfer to some other (in most cases the King's Bench) division. If the defendant desires the action to be so tried, he should apply under the summons for directions for the necessary transfer to be made ; and, for all practical purposes, it may be assumed that, failing any such transfer, the

action will be tried before a Judge of the Chancery Division without a jury.

In the absence of any written agreement between the parties, or any special order of the Court, to the contrary, the evidence at the trial of every action commenced by writ of summons in the Chancery Division is given *vivâ voce*, as in the King's Bench Division; but the rules contain special provisions for the trial of actions on affidavit (with certain facilities for cross-examination), in all cases where the parties shall in writing so agree (O. XXXVIII., rr. 25-30). After such an agreement, the action falls within the category described in the cause lists as 'non-witness actions'; but such agreements seldom occur in practice.

As regards what is and what is not evidence, the admissibility of evidence, the weight of the evidence when admitted, and generally as regards all the rules of evidence, the Chancery Division is nominally in entire agreement with the King's Bench Division; though it may be doubted whether the rules are generally applied as strictly in the former division as in the latter.

*Judgment and consequential proceedings.*—(i) *Judgment.*—There is usually a considerable difference between a judgment or order of the Chancery Division and a King's Bench judgment; the latter judgment being, usually, for the recovery of a specified sum of money, or the possession of specific land or chattels, whereas, in the Chancery Division, the judgment must be adapted to the nature of the relief sought, which is seldom of so simple a character. And first it is to be noted, that there is nothing in the Chancery Division corresponding to the practice of 'signing judgment' in the King's Bench Division; or at least there is no such thing as an order giving leave to sign judgment. The decision of the Court, whether pronounced at the

trial of the action, or on motion for judgment, or otherwise, is finally recorded by means of a single document drawn up in the manner which we are about to explain. But, before doing so, it is convenient to remark here, that the principal cases in which judgment is obtained on motion, as distinguished from the trial of the action, are (*a*) in default of defence, and (*b*) on admissions in the pleadings; the latter case being particularly common in actions for partition.

The judgment is drawn up by the Registrar, who is present in court on the day when it is delivered or made, and takes down a note of it in his book. Very frequently, for the assistance of the Registrar in more complicated cases, the Judge directs the junior counsel for the plaintiff to sign 'minutes' of the judgment; and, in any case, the solicitor of the successful party 'bespeaks' the judgment by leaving at the Registrar's office his counsel's briefs endorsed with a note of the decision, and the 'minutes,' if any, which have been signed by the direction of the Judge. The Registrar then issues what is sometimes called 'minutes,' but is in reality the draft of the judgment or order; a copy being furnished to each solicitor engaged in the case. This draft is settled by the Registrar in the presence of the solicitors; and, subsequently, the judgment or order is 'passed'—*i.e.*, the engrossment, after being duly stamped, is examined and initialled by the Registrar, in the same way. The original judgment is then deposited at the 'entering seat'; and an official duplicate is issued in exchange to the solicitor of the successful party. With the exception of certain simple orders of procedure, made and drawn up in the Judge's chambers, all orders made in the Chancery Division are drawn up in the manner just explained. It is to be noticed, moreover, that it is the practice of the Chancery Division to state precisely upon whose application the order is made,



and all the parties in whose presence it is made ; accounting for any parties to the action who may not have been represented on the application. The common practice of the King's Bench Division, of merely prefacing the order with the recital that it is made ' upon hearing ' counsel (or the solicitors as the case may be) ' on both sides,' or ' for all parties,' is never followed in the Chancery Division.

In many cases the judgment, thus delivered and recorded, finally disposes of all matters in dispute ; but it frequently happens, both at the trial of an action and also on motion for judgment, that, before justice can be completely administered, accounts and inquiries of varying degrees of complexity have to be taken and made, and often also real or other property sold. And indeed in some classes of actions (*e.g.*, foreclosure and partition among many others), some such accounts and inquiries are almost inevitably necessary. In all such cases, the judgment directs the necessary accounts and inquiries to be taken and made, specifying them clearly in numbered paragraphs, and proceeds to direct that the *further consideration* of the action be adjourned, until the result of the accounts and inquiries has been ascertained and certified.

*Prosecution of accounts and inquiries.*—If, as almost invariably occurs, the judgment or order is silent as to the manner in which the accounts and inquiries directed are to be taken and made, the subsequent procedure is as follows. After drawing up the order (which expression must in the following remarks be understood to include a judgment) in the manner explained above, the party having the carriage of the order issues a SUMMONS TO PROCEED with the accounts and inquiries directed (Order LV., rr. 32–37) ; and, on issuing such summons, leaves in the chambers of the Judge a certified copy of the order. The summons

is returnable before one of the Masters (formerly known as 'chief clerks') attached to the chambers of the Judge; and all subsequent proceedings in chambers in the same action are taken before the same Master.

The first duty of the Master is to ascertain, so far as is possible upon the materials then before him, that all necessary parties are before the Court. If it appears that some such are absent, the Master directs the plaintiff, or other party having the conduct of the action, to serve the absentees with notice, in proper form, of the judgment or order; the effect of the notice being, that the party served is bound by, and is, on entering appearance, at liberty to attend, the proceedings, as if he had originally been made a party. When any party so served fails to appear, a memorandum of the service upon him may be entered in the Central Office on proof of the service; and thereupon the proceedings continue in default of his appearance. If, as often happens where there are many parties interested, it appears that the interests of the parties can be classified, it is the duty of the party having the conduct of the action to apply for an order that the parties constituting any class similarly interested be represented by the same solicitor. The effect of such an order, commonly known as a 'classification order,' which must be distinguished from the 'representative order' already considered (p. 553), is, that any party affected by the order, wishing to be represented subsequently by a separate solicitor, can be so represented only at his own expense.

The Master's next business, with which indeed he may be proceeding before he has completed that which we have just described, is to give directions as to the parties by whom, and the times within which, the evidence necessary to enable him to certify the result

of the accounts and inquiries is to be filed. Inasmuch as the form and substance of the accounts and inquiries directed must vary according to the peculiar circumstances and requirements of each particular case, it will be convenient to explain the procedure by means of an example of common occurrence ; and, as such an example, we may take the form of an order directing a complete series of accounts and inquiries in an administration action under the Rules of the Supreme Court, and assume that the testator, by his will, after giving certain legacies and annuities, bequeathed all his real and personal estate to his executors upon trust for sale, etc., and that the plaintiff in the action is the person beneficially entitled to the ultimate residue of the proceeds of sale, and the defendants the executors and trustees. The form mentioned above, with the additions necessary in the particular circumstances, is as follows :—

This court doth order that the following accounts and inquiry be taken and made ; that is to say—

1. an account of the personal estate not specifically bequeathed of A.B., deceased, the testator in the pleadings named, come to the hands of the defendants, B., C., and D., the executors of the will of the said testator, or any of them, or to the hands of any other person or persons by the order or for the use of the said defendants, or any of them ;

2. an account of the testator's debts ;

3. an account of the testator's funeral expenses ;

4. an account of the testator's legacies and annuities (if any), given by the testator's will ;

5. an inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered that the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

And it is ordered that the following further inquiries and accounts be made and taken ; that is to say—

6. an inquiry what real estate the testator was seised of or entitled to at the time of his death ;

7. an account of the rents and profits of the testator's real estate received by the defendants B., C., and D., the trustees of the testator's will, or any of them, or by any other person or persons by the order or for the use of the said defendants or any of them ;

8. an inquiry what incumbrances (if any) affect the testator's real estate, or any and what parts thereof ;

9. an account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed, in respect of their incumbrances ;

10. an inquiry, what are the priorities of such last-mentioned incumbrancers.

And it is ordered that the testator's real estate be sold with the approbation of the Judge, free from the incumbrances (if any) of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

And it is ordered that the money to arise by the sale of the testator's real estate be paid into court to the credit of this action (*short title and reference to record*) to an account entitled " Proceeds of Sale of Testator's Real Estates," subject to further order. And if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied, in the first place, in payment of what shall appear to be due to such incumbrancers, according to their priorities.

And it is ordered that the further consideration of this case be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

It is obvious that, as regards some of these accounts and inquiries, the Master cannot finally certify the result until the whole of the testator's real and personal estate has been converted into cash ; and he will therefore direct his attention in the first place to



those matters which can be ascertained without delay. Accordingly, with regard to accounts Nos. 2 and 3, he will direct the plaintiff, or other party having the conduct of the action, to prepare the usual form of advertisement for creditors, and will fix the newspapers in which the advertisement is to be published, and the times within which the claims are to be sent in to the defendant's solicitor, and will direct the defendants to file their affidavit as to the claims received by them pursuant to the advertisements, and fix the date for adjudication upon the claims.

The last-mentioned date is not of such practical importance as might perhaps be supposed. The present practice is that the parties attend before the Master; and the defendants' solicitor produces an office copy of the defendants' affidavit verifying a list of the claims received, such list being divided into two parts, one of which contains particulars of claims proper to be allowed without further evidence, and the other, particulars of those which ought to be proved by the claimants. The appointment is then adjourned for the first part of the list of claims to be checked by one of the Master's clerks, and for the defendants' solicitor to give notice in the prescribed form to the creditors named in the second part of the list to come in and prove their claims by affidavit; a date being fixed by which the evidence is to be filed, and another on which the adjudication is to take place. Any creditors who may be present at this appointment are informed that they need not attend again without further notice.

Turning now to the other accounts and inquiries, it is clear that, in the first instance at all events, all of them, down to and including No. 8, must, in the circumstances of our example, be answered sooner or later by the defendants; the practice being, for obvious reasons, always to direct the evidence in

answer to accounts and inquiries to be filed in the first instance by the party possessing the best means of knowledge, and for the Master to give directions accordingly. But it is also clear that some time must elapse after the testator's death before the defendants can complete their account No. 1, and that the whole of the real estate must be sold before their account No. 7 can be closed. It is usually found convenient, in such a case as this, for the defendants, about the time when they file their affidavit verifying the list of claims received, to file also an affidavit in the form prescribed, dealing with the other accounts and inquiries, so far as is possible at that date. This affidavit begins with a statement of the testator's personal estate at the date of his death; then come particulars of the funeral expenses; and after that the affidavit verifies an account showing all receipts and disbursements in respect of the personal estate down to the date of the affidavit. Naturally the next thing is a statement of the personal estate 'out-standing or undisposed of,' *i.e.*, the balance of the testator's personal assets at his death remaining after the transactions shown in the account just mentioned. The affidavit then proceeds to set out particulars of the testator's real estate at the date of his death, and of the encumbrances affecting the same or any and what parts thereof. And, lastly, the deponents verify an account of the rents and profits of the real estate received by them, and of their disbursements in respect thereof.

Upon the filing of this affidavit, the Master has before him particulars, which are seldom substantially inaccurate, of the whole estate upon which the judgment is to operate. But it is open to any party able to do so to 'surcharge' the accounting parties (*i.e.*, to prove that they have received more than they admit), or to 'falsify' their accounts by objecting to

payments or allowances claimed therein. At this stage, the Master will usually direct notice of the judgment to be served on all the encumbrancers disclosed by the defendants' affidavit ; in order that they may come in and prove their encumbrances, and be bound by his findings as to the amounts due to them respectively, and also prove their priorities *inter se*—as to which matters they will have an opportunity of filing such evidence as they may be advised. It is also necessary to ascertain whether or not they will consent to the sale of the portions of the estate affected by their respective encumbrances, free from such encumbrances.

The defendants may at any time, when in doubt as to the best means of realising any part of the estate still outstanding, apply to the Master by summons for his directions ; and this is usually done by first entering into a conditional contract to effect the sale, or whatever the transaction may be, and then submitting the contract to the Master for confirmation. This may be done with regard to real estate as well as personal estate ; but, as regards the former, the Master will generally, in the first instance, prefer to follow the usual routine of sale by auction, which will be described later (pp. 568–573).

*Proof of debts.*—We return now to the account of debts (No. 2). The Master's clerk, to whom the first part of the list verified by the defendants' affidavit has been referred, will usually require the defendants' solicitor to produce for his inspection the actual claims from which the list has been compiled ; and he will then direct notice to be given to any creditor who appears to hold a bill, or note, or any other security, to attend before him and produce the same. If the Master's clerk suspects that any claim included in this part of the list is statute-barred, or open to objection on any other ground, he will refer the matter

to the Master, who may require notice to be given to the creditor to prove the claim in the manner explained above (p. 567). The defendants, being the testator's executors, are of course entitled to file evidence in opposition to that filed by any creditor who has been required to prove his claim ; but no party other than the executors or administrators of the deceased, will, except by special leave, be entitled to appear on the adjudication of the claim of any person who is not a party to the action. Where necessary, the Master will adjourn the adjudication, to enable any creditor to file evidence in reply to that filed in opposition to his claim ; and he will proceed as soon as possible to adjudicate finally upon each claim on the affidavits filed for and against. When he has done so, and the evidence necessary to enable him to certify the result of the other accounts and inquiries is complete, he will 'adjourn for certificate,' *i.e.*, for the draft of his certificate to be prepared by one of his clerks. The Master may (but seldom will) direct the draft certificate to be prepared by the solicitor for one of the parties.

*Sale by the Court.*—It is now time to consider how the sale of the testator's real estate directed by the judgment is to be carried out. Where, as in this case, the sale is to be 'with the approbation of the Judge,' the procedure is as follows. The party or parties having the conduct of the sale (*i.e.*, in the absence of any special order to the contrary, in an action for administration of an estate or execution of the trusts of a deed, the executor, administrator, or trustee, and, consequently, in this case the defendants) having consulted an auctioneer and, if prudent, satisfied themselves that he will be content with such remuneration for his services as the Court may allow, will file an affidavit by the auctioneer known as the 'affidavit of lotting,' whereby the auctioneer verifies particulars



of the property to be sold, either in one lot or several lots, as he may think best. At the same time, the defendants will file an affidavit made by some independent witness, proving the fitness and integrity of the auctioneer. On these materials, the Master will fix the auctioneer's remuneration upon a scale graduated according to the amount realised, and will refer the particulars, and an abstract of title brought in by the defendants, to one of the Conveyancing Counsel of the court, to settle the draft particulars and conditions of sale, subject to revision by himself. In settling the draft, the Conveyancing Counsel will frequently leave open certain points to be settled by the Master ; and, in any case, the Master must approve the draft and fix the dates for the sale to be held, for his certificate of the result to be settled (in the presence of any purchaser desiring to attend), and for the balance of the purchase moneys to be paid into court. The most convenient course is for the Master to defer fixing these dates (of which the last two must obviously depend upon the first) until all other points have been finally settled, and then to allow the parties having the conduct of the sale to file the auctioneer's ' affidavit of value,' upon which the Master has to fix the reserve prices. This affidavit clearly cannot properly be made until the conditions have been settled ; and, as the auctioneer is responsible for the advertisements of the sale, he should be consulted as to the date and place of it, these being matters of which he is, presumably, the best judge. The affidavit must refer, as an exhibit, to the particulars and conditions ; and the best plan is to use as the exhibit a proof print with the dates left blank, and let the affidavit contain a paragraph stating the auctioneer's opinion as to the most convenient date and place for the sale.

Upon these materials, the Master can finally settle the particulars and conditions of sale, and fix both the

reserve prices and the security to be given by the auctioneer for the deposits which he will receive under the conditions if the property is sold. In order to prevent intending bidders from obtaining information as to the probable amount of the reserve prices, by searching the file of affidavits, the Rules provide (O. LI., r. 4), that the auctioneer shall not disclose his opinion as to the value in the body of his affidavit, but by means of an exhibit. Where it appears to the Master from this affidavit that the total amount to be received by the auctioneer in respect of deposits will not exceed 200*l.*, it is the usual practice to accept an undertaking by the auctioneer alone as sufficient security; and, where the amount does not exceed 500*l.*, the security may be given by an undertaking by the auctioneer jointly with sureties or a guarantee society. In other cases, the auctioneer is required to enter into a recognisance with two sureties, unless the Master shall see fit to accept one as sufficient, or procure a bond to be given by a guarantee society in double the total amount of the deposits to be received, calculated according to the reserve prices recommended in his affidavit of value. Before the sureties, whether they be private individuals or a guarantee society, are accepted, they must make an affidavit proving the adequacy of their means, or, as it is usually called, an 'affidavit of solvency.'

The necessary instructions to the auctioneer are then prepared in the Master's chambers; but their contents are not so important to the practitioner as the fact that the party having the conduct of the sale must not forget to call for them a day or two before the date fixed for the sale, when they will be handed out to him in a sealed envelope addressed to the auctioneer. The papers consist of a printed form of directions to the auctioneer, a copy of the particulars and conditions of sale, and a note of the reserve prices fixed, all signed

by the Master, a bidding paper to be filled up and signed by the auctioneer with particulars of the result of the sale, and a form of certificate to be signed by the auctioneer and countersigned by the solicitor for the party having the conduct of the sale, verifying the particulars and conditions of sale and the bidding paper, and giving details of the purchase moneys.

Upon these materials, when completed and returned to his chambers, the Master proceeds to certify the result of the sale; and in due course the certificate is signed and filed. After it has become binding (see p. 575), the completion of the sale proceeds as in ordinary sales of land (Vol. II., pp. 292–306), down to the point at which the purchaser is ready to pay his purchase money; and, as regards this, the practice now usually adopted is for the purchaser to bring into the Master's chambers a form of lodgment schedule, stating the amount payable for principal and interest, the ledger credit to which it is to be placed, and how, if at all, it is to be invested, also the name and address of the purchaser, and a 'restraint' or 'stop' in his favour, *i.e.*, a direction that the fund is not to be transferred or paid out without notice to him. This schedule is settled in the Master's chambers, in the presence of the solicitor for the party having the conduct of the sale, who checks the directions as to the ledger credit, investment, etc., and sees that the purchaser is required to accept the title before the schedule is signed. The schedule, when settled, is engrossed and left in chambers for signature by the Master, after which it is transmitted direct to the Pay Office, where, in due course, the purchaser's solicitor can obtain the necessary directions to the Bank of England, Law Courts Branch, to receive the amount of the purchase money payable. Upon receiving the money, the Bank returns the directions to the Paymaster with the addition of a certificate of the receipt; and the Paymaster

then files the complete document or 'certificate of lodgment' at the Central Office, where the purchaser obtains an office copy. The sale can then be completed by the purchaser handing to the solicitor for the party having the conduct of the sale, in exchange for the conveyance, the office copy certificate of lodgment in lieu of cash, and also, if so required, as he always should be, an authority to consent on his behalf to the removal of his restraint on the fund, so as to obviate the necessity for service upon him of notice of any subsequent application to deal with the fund.

The deposits received by the auctioneer should be paid into court immediately after the filing of the certificate of the result of sale, by means of a similar lodgment schedule brought in by the solicitor having the conduct of the sale. The auctioneer is not allowed to deduct, from the deposits received by him, either his remuneration or his disbursements, both of which are subject to taxation as disbursements in the bill of costs of the party having the conduct of the sale.

The Court has jurisdiction to permit any sale which it has ordered, to be conducted by proceedings altogether out of court ; but it can do so only in cases where it is satisfied that all persons interested are before the Court, or bound by the order for sale. And the order authorising the sale to be so conducted must be prefaced by a declaration to that effect, and a statement of the evidence upon which such declaration is made ; and even then the Court will almost invariably require the reserve prices and auctioneer's remuneration to be fixed by the Master, and the purchase money to be paid directly into court.

Where any sale by auction under an order of the court proves abortive as regards all or any of the lots, the party having the conduct of the sale will, in the first place, endeavour, through the auctioneer or otherwise, to obtain offers to purchase by private contract ;



and if he receives any offer which he thinks should be accepted, he will enter into a conditional contract with the person making the offer, subject to confirmation by the Court within a specified time. This contract will, of course, contain all the cardinal provisions of the conditions of sale settled by the Conveyancing Counsel, including those relating to payment into court of the purchase money; and it will also contain, for the benefit of the purchaser, an engagement by the vendor (*i.e.*, the party having the conduct of the sale) forthwith to apply for and use his best endeavours to obtain the sanction of the Court. The vendor will then apply for such sanction, by summons supported by an affidavit of the auctioneer, alleging the sufficiency of the purchase money, and, if it is less than the reserve price previously recommended by him, accounting for his change of opinion. The order confirming the contract will incorporate the necessary lodgment schedule for payment into court of the purchase money and deposit. Unless purchasers for all the unsold lots can be found in this way, there is no alternative but to offer the property for sale by auction again, after the lapse of a reasonable time; and it is then necessary to go again through all the routine which has been described above.

*The Master's certificate.*—We can now return to the consideration of the Master's 'general' certificate of the result of the accounts and inquiries directed by the judgment (p. 564). A copy of the draft can be obtained by the solicitor for the party having the conduct of the action; and the other solicitors engaged can obtain copies from him. The certificate states, in a series of paragraphs numbered to correspond with those in the judgment, the result of the several accounts and inquiries directed by the latter; and each finding is followed by a statement of the evidence upon which it is based.

Accordingly, in the circumstances of our example, assuming the estate to be solvent and more than sufficient to pay all legacies, etc., and all the real estate to have been sold with the consent of the encumbrancers, the effect of the certificate will be substantially as follows :—Paragraph 1 will state the amounts respectively received and paid by the executors, and the balance due to or from them, as the case may be. Paragraph 2 will refer to a schedule containing particulars of the testator's debts, including the sums allowed to creditors for the costs of proving their claims, and will, if such is the fact, proceed to state that such debts have been paid and allowed in the executors' account of personal estate. Paragraph 3 will state the amount of the testator's funeral expenses, and the payment, etc., as above. Paragraph 4 will refer to a schedule containing (in separate parts) particulars of the legacies and annuities given by the will, and the extent, if any, to which the same have been paid. In like manner, paragraph 5 will show particulars of the personal estate outstanding ; paragraph 6, particulars of the testator's real estate at the time of his death ; and paragraph 8, particulars of encumbrances affecting the real estate. Paragraph 7 will deal with the rents and profits of real estate, in the same manner as paragraph 1 has dealt with personal estate ; and paragraph 9 will state that all the real estate has been sold, and state the amount of the purchase moneys which have been paid into court.

The draft certificate is settled in the Master's chambers, in the presence of the solicitors for all parties ; but it is seldom possible to complete this work at a single sitting. And where, as usually happens, a number of adjournments are necessary, it is common for the bulk of the work to be done in the presence of only the solicitors for the more important parties ; the others being summoned to attend only the appoint-

ment at which the draft is finally settled. All parties are entitled to attend upon the examination of the engrossment, which is then signed by the Master and transmitted by him to be filed at the Central Office. Within eight days after the filing of the certificate, any party dissatisfied with any of the Master's findings may apply by summons to vary the same; but in the absence of any such application within the eight days (or any special circumstances to justify its being made at a later date), the certificate becomes binding on all parties to the proceedings at the expiration of eight clear days from the date of filing. The summons to vary is, like all other summonses in the Chancery Division, returnable in the first instance before the Master; and no evidence beyond that upon which the certificate is founded can be used in support of it, except by special leave. The Master usually adjourns the summons into court, to come on with the hearing of the action on further consideration (p. 578).

*Receivers.*—Before passing on to the next stage of the proceedings, it may be noted here that the form of judgment which we have taken from the Rules of the Supreme Court as our example, does not include the appointment of a RECEIVER—a matter too common to be ignored in the shortest notice of the practice of the Chancery Division. Such a judgment would, wherever necessary, include, and at one time would more often than not have included, the appointment of a receiver; either to get in the testator's outstanding personal estate, or to receive the rents and profits of the real estate, or both. Perhaps the commonest class of case in which a receiver is appointed is that of debenture-holders' actions, and other actions for foreclosure of mortgages; and in such cases the receiver is usually, where expedient, appointed also manager of the defendants' business. The application, whether made by interlocutory motion, or at the trial of the action,

must be supported by affidavit evidence of the receiver's fitness ; and where, owing to the urgency of the case or otherwise, such evidence has not been obtained, but the Court is satisfied that a receiver should be appointed, it may refer the appointment of a fit and proper person as receiver to chambers, *i.e.*, to the Master, to be ordered by him on application by summons. But, generally speaking, with this exception, the order cannot be made on summons except by consent.

The substance of the common form of order is, that the Court, upon the plaintiff's undertaking to be answerable for what the receiver shall receive before giving security, appoints a named person (usually an accountant) to receive the rents and profits of the properties comprised in the plaintiff's securities mentioned in the endorsement on the writ of summons, without prejudice to the rights of any other encumbrancers, and (if necessary) to manage and work the business carried on by the defendants ; and, out of the first moneys to be received, to pay the debts due from the said business. And it is ordered that the receiver appointed do forthwith give security pursuant to Order L., r. 16, to the satisfaction of the Judge, and do pass his accounts and pay the balances which shall be certified to be due from him, as the Judge shall direct.

As soon as the order has been entered, the plaintiff issues a summons to proceed, and files in support of it an affidavit containing the best evidence reasonably obtainable as to the nature and value of the property which the receiver is likely to receive. The Master then decides, according to the circumstances, the amount of security to be given, and fixes the times when the receiver is to bring in his accounts ; the first account being usually due six months after the date of the order appointing the receiver, and subsequent accounts at intervals of six or twelve months. The



Master may also, by this certificate, fix the time within which the receiver is to pay into court the balance to be certified as due from him on passing each of his accounts, as, *e.g.*, the fourteenth day after the date of the certificate of passing such account.

All these directions are incorporated in the Master's certificate of the receiver having given security; which certificate is completed in the manner already explained (p. 576), as soon as possible after the security has been given. This process is usually effected by means of a bond by a guarantee society, either with or without a separate recognisance by the receiver; the approval of the Master being signified by a note in the margin signed by him, and the bond and recognisance, if any, being then transmitted to the General Filing Department of the Central Office. The receiver's salary or allowance is fixed by the Master on passing the accounts, usually at a percentage on the receipts; regard being had, of course, to the amount of work involved. The receiver brings in his accounts as they become due, verified by affidavit in the form prescribed; and the Master proceeds forthwith to certify the result, and the time and manner in which the receiver is to dispose of the balance, if any, due from him, that is, assuming that all necessary directions in the last-mentioned respect have not been given by the certificate of the receiver having given security.

When the receiver has discharged all his duties (as, for example, when he has got in all the testator's outstanding personal estate, and the real estate, the rents and profits of which he was to receive, and the business, if any, which he was to manage, have all been sold) the Court will, upon the application of the plaintiff by summons, order the receiver to be discharged, and to pass his final account, and to dispose

of the balance to be certified due from him thereon as the circumstances may require, and that thereupon the security given by him be vacated. The receiver then proceeds to pass his final account in the manner explained above; and the result is, that all moneys realised by him are in court standing to the credit of the action, and available for disposal by order to be made on further consideration, or otherwise according to the nature of the proceedings.

*Further consideration.*—The estate being solvent, and the judgment having merely adjourned the further consideration, without any special directions as to where it is to come on, the hearing will be in court and not in chambers. The plaintiff or other party having the conduct of the action will, after the expiration of eight days, and within fourteen days, from the filing of the Master's certificate, set the action down for hearing or further consideration, by means of a request lodged in the Registrar's office; and, on the plaintiff's default, after such fourteen days, any other party may do so instead. The hearing cannot take place until ten days after setting down; and at least six days' notice must be given to all parties except such as, having been served with notice of judgment, have failed to enter appearance.

Usually the party having the conduct of the action prepares, and submits to the other parties for approval, minutes of the order which he proposes to ask the Court to make. By this means it often happens that the main substance of the order is virtually settled by the parties out of court; but where, as generally happens, infants or other persons under disability are concerned, the Court must always satisfy itself of the propriety of the order. The form of the order must of course depend upon the circumstances of the case, and will be such as to complete, so far as is possible at the time, the administration of justice

between the parties. Such complete administration may or may not be possible at this stage; and it may be, and often is, necessary to direct the continuation of some of the accounts, and even perhaps the addition of further accounts and inquiries. In the comparatively simple circumstances of our example, and in the absence of any continuing annuities (for which, of course, provision would be necessary), a final order can now be made. Such an order would contain the necessary directions for taxation and payment of the costs of the action, and, subject to the payment of the costs, and the debts (account 2) and legacies (account 4), if any, remaining unpaid, for the payment and transfer to the plaintiff, as residuary legatee, of the balances, if any, found due from the defendants under accounts 1 and 7, together with the outstanding personal estate (inquiry 5) and the residue of the proceeds of sale of real estate, after providing for payment of the encumbrances according to the Master's findings under inquiries 8 and 10, and account 9.

Applications for orders on the further consideration of any cause or matter, where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture-holders, may be made by summons in chambers; in other cases applications for orders on further consideration are now usually made in court, except in cases where further consideration in chambers has been specially reserved (see Order LV., r. 2 (16) note, in *Yearly Practice*).

*Execution.*—Although, since the taking effect of the Judicature Acts, there has been no distinction between the forms of execution available in the Chancery Division and those available in the King's Bench Division, there are some forms which occur so much

more frequently in the former Division than in the latter as to call for some special mention here.

*Attachment and Committal.*—First, as regards *attachment* of the person and *committal*. It is now hardly necessary to draw any distinction between these two forms of execution, which are available in cases of contempt of court. Before the Judicature Acts, a man was attached for neglecting to do some act ordered to be done, and committed for doing a prohibited act (see the note by Mr. Registrar Lowie appended to *Re Evans* [1893] 1 Ch. 259); and the latter offence was considered the more heinous, inasmuch as it was less easily capable of remedy in case of repentance. But now the practice is, in almost all cases, to apply for both processes alternatively. It would be beyond the scope of this work to attempt to specify all the instances in which either process can be applied (see O. LXIV., rr. 1 and 2 and notes in *Yearly Practice*); but the cases of commonest occurrence in which one or other is available, include the following: (1) disobedience to a judgment or order for the payment of money which falls within the exceptions specified in section 4 of the Debtors Act, 1869 (which comprise (i) default by a trustee or a person acting in a fiduciary capacity, ordered to pay by a court of equity any sum in his possession or under his control, and (ii) default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order); (2) disobedience to a judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing anything; (3) failure of a party to comply with an order for discovery (including interrogatories) or inspection; (4) interference with receivers and other officers of the court in the execution of their duties;



and (5) interference with wards of court. But this list is by no means exhaustive; and it should be mentioned, that a judgment or order against a corporation may be enforced by attachment against the directors or other officers (*R. v. Poplar Borough Council* 1921 [1922] 1 K. B. 95). It will be seen, that one or other of the two processes is available in case of the breach of almost any injunction; and this form of execution is available in the case of disobedience to either interlocutory or final orders.

The practice requires careful attention; and is as follows. First of all, where the contempt consists of disobedience to a judgment or order requiring any person to do any particular act, such judgment or order must state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order served upon the person required to obey the same there must be endorsed a memorandum to the effect following, viz.: "If you the within-named "A. B. neglect to obey this judgment [*or order*] by "the time therein limited, you will be liable to process "of execution for the purpose of compelling you to "obey the same judgment [*or order*]" If the order does not state the time within which the act is to be done, before leave to issue a writ of attachment can be given, a supplemental order, commonly known as a 'four-day' order, must be obtained, which will fix a time, usually four days after service. Personal service of the order is not necessarily a condition precedent to the issue of a writ of attachment in every case; but practically it is so, owing to the difficulty which must be surmounted, of convincing the Court that the party against whom the order was made knew of its existence, and intentionally evaded service.

The application is by motion; notice of which must be served on the respondent personally, whether he

has or has not entered appearance in the action. The notice must state the grounds of the application ; and there must be served with it copies of any affidavits intended to be used in support. There is some authority for the proposition that this last requirement extends to all exhibits mentioned in the affidavits (although such a thing as an omnibus might be an exhibit), and also to the affidavit of service of the notice, which obviously cannot have been sworn at the time of the service. However that may be, it is wise to serve copies of all exhibits so far as is reasonably possible, and a copy of the affidavit of service as intended to be sworn (the jurat being left blank) ; and to add to the notice of motion a statement of the affidavits intended to be used in support, and to the affidavit of service a schedule of the affidavits and exhibits, copies of which are served with the notice. As a rule, the consequence of failure on the part of the applicant to observe any of these formalities is, that the motion is dismissed with costs, without any regard to the merits of the application ; but it is difficult to see why the applicant should be visited with so severe a penalty, or why he should not, as a general rule, be given an opportunity of repairing the irregularity, whatever it may have been. As has been indicated above, the notice of motion will, as a rule, ask that the applicant be at liberty to issue a writ or writs of attachment against the respondent, or, alternatively, that the respondent stand committed to prison, for his contempt, particulars of which will then be stated. Usually the Registrar will give facilities for the order to be completed within a few hours after it has been made ; but a not infrequent direction is that the writ should lie in the office for a fortnight or a month.

*Charging Orders and Stop Orders.*—Among other forms of execution frequently occurring in the Chancery

Division it is necessary to notice *charging orders* and *stop orders* affecting funds in court; and, though brief allusion has been made to these in an earlier chapter (pp. 542–543), it will be well, as they are of special importance in Chancery practice, to set out a little more fully the procedure with regard to them (Order XLVI.).

In either case, the application is made by an assignee, or creditor, whose assignor or debtor is entitled to some interest (either immediate or in reversion) in the whole or a part of a fund in court. An assignee claiming under an express assignment, whether absolute or by way of mortgage, of the assignor's interest in the fund in court, requires only a *stop order*, *i.e.*, an order that the share or interest of the assignor in the fund in court shall not be transferred or otherwise dealt with without notice to him, the assignee; and, for the purpose of preserving his priority, the assignee of any interest in a fund in court will always apply for a stop order immediately after the execution of the assignment. A creditor who has no such express assignment must go a step further, in order to secure payment of his debt out of the fund in court; and, upon obtaining a judgment against the debtor, he may apply for an order that the debtor's share or interest in the fund in court stand *charged* with the payment of the judgment debt, and, further, be not dealt with, without notice to him.

The jurisdiction to make charging orders, which may affect not only funds in court but also any stock or shares not in court, arises under the Judgments Acts, 1838 and 1840; but applications for such orders in the Chancery Division almost invariably relate to funds in court. The application for a stop order is made by ordinary summons, which must be served upon the assignor; but a charging order is obtained by a procedure uncommon in the Chancery Division,

inasmuch as, in the first instance, an order *nisi* is made on *ex parte* summons, fixing a time when the debtor may appear and show cause against the order being made absolute. The object of this practice is, of course, to prevent the debtor from defeating his creditor by assigning his interest in the property on hearing of the creditor's intention to secure it. The order *nisi* is served upon the debtor; and, unless he succeeds in showing cause to the contrary at the time fixed, an order absolute is then made. The Paymaster-General is required to notify, by endorsement on every certificate of fund issued by him, short particulars of every order restraining any dealings with the fund; and, inasmuch as upon every application for an order dealing with any fund in court, the applicant is always required to produce a certificate of fund, an effective check is thus secured against the risk of any stop order being overlooked.

A separate action is necessary for enforcing a charging order, which may be enforced by sale, like any other mortgage or charge. Sale, not foreclosure, is the usual remedy; but it has been indicated by the Court of Appeal, that this is a matter not of jurisdiction but of practice, and that the Court has the power, in a proper case, to order foreclosure in lieu of sale (per Lord Cozens-Hardy, M.R., in *Hosack v. Robins* [1917] 1 Ch., at p. 336). But an action for its enforcement is not maintainable until six months have elapsed from the date of the order *nisi*. As regards the making of the order itself, a practice similar to that relating to charging orders obtains also in the case of *garnishee* orders (pp. 541-542), whereby any person indebted to a judgment debtor may be ordered to pay his debt to the judgment creditor. But such orders are of rare occurrence in the Chancery Division.

*Distringas notice*.—A matter of considerable importance to the practitioner in this Division is a *distringas* notice, whereby any person claiming to be



interested in any stock or shares standing in the books of a company (*scil.* in the name of another) may, on an affidavit by himself or his solicitor stating that he is so interested, and on filing the same in the Central Office, together with a notice specifying the stock or shares, and stating whether it is intended to stop the transfer of the stock or shares only, or the receipt of the dividends, or both, serve on the company an office copy of the affidavit and sealed duplicate of the notice. The effect of the notice is, to prevent the company from permitting the transfer of the stock or shares, or paying the dividends thereon, as the case may be, without first giving to the person who issued the notice an opportunity of asserting his claim; which he can do by applying for an injunction within eight days after receiving notice from the company of its intention to deal with the stock, shares, or dividends (Order XLVI., rr. 3, 4, 10).

*Appointment of a receiver.*—Applications for the appointment of a receiver, by way of so-called 'equitable execution,' as a means of enforcing a judgment, occur occasionally in the Chancery Division (Order L., rr. 15A-22). This form of relief, which, in the case of equitable execution, is usually obtained by summons, is available when it is desired to obtain satisfaction of the judgment out of certain specific property (real or personal) of the debtor, and the ordinary legal execution by *fi. fa.* or by *elegit* is not readily available, in respect of that specific property. This mode of execution, however, will not be granted except where the amount of the judgment debt justifies the expense; for it is not 'just or convenient' to incur such expense on a judgment for an inconsiderable amount. In all cases where a receiver is appointed by way of equitable execution, the appointment operates to charge the specific property, that is to say, the judgment debtor's interest therein; and, consequently, the order appointing the receiver

is expressed to be without prejudice to any existing charge or encumbrance on such property. The appointment of a receiver by way of equitable execution does not make the creditor a secured creditor for the purposes of the Bankruptcy Acts, except in the case of the appointment of a receiver of the debtor's equitable interest in land, nor does it give him priority over earlier equitable encumbrancers. But it does appear to give him priority over later equitable claims ; and, in the case of land (though not of personalty), when the order appointing the receiver has been registered, to entitle him to an order for sale under the Judgments Act, 1864. But a banker who has merely been served with notice of the appointment of a receiver, in a proceeding to which he was not a party, is justified in allowing his customer to draw on the account, unless, within a reasonable time, steps to attach the money have been taken (*Giles v. Kruyer* [1921] 3 K. B. 23).

## II.

We have now to deal, in the second place, with proceedings in the Chancery Division commenced OTHERWISE THAN BY WRIT OF SUMMONS. Of these the method of institution may be either (i) originating summons, or (ii) originating motion, or (iii) petition. And we will now proceed to consider these different methods shortly in the order named ; on the understanding that, except where otherwise stated, the procedure in matters of detail is identical with that described above in connection with actions commenced by writ of summons.

(i) An *originating summons* is defined by the Rules as any summons other than a summons in a pending cause or matter. The following tabular statement shows some of the more important causes of action in respect of which relief can be obtained on originating summons, the source of the jurisdiction, and the

parties who must in the first instance be before the Court, either as applicants or as respondents.

Source of jurisdiction.	Subject of application.	Parties to be served.
Ord. LV., r. 3 (a)	In matters relating to the estate of any deceased person or the trusts of any deed or instrument— any question affecting the rights or interests of person claiming to be creditor, devisee, legatee, next-of-kin, heir-at-law, or <i>cestui que trust</i> ;	the executor, administrator, or trustee, and one or more of the persons whose rights or interests are sought to be affected.
Ord. LV., r. 3 (b)	the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others ;	the executor, administrator, or trustee, and any member or alleged member of the class.
Ord. LV., r. 3 (c)	the furnishing of any particular accounts by the executors, administrators, or trustees, and the vouching (when necessary) of such accounts ;	the executor, administrator, or trustee, and any person interested in taking such accounts.
Ord. LVa., r. 3 (d)	the payment into court of any money in the hands of the executors, administrators, or trustees ;	the executor, administrator, or trustee, and any person interested in such money.
Ord. LV., r. 3 (e)	directing the executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such ;	the executor, administrator, or trustee, and one or more of the persons whose rights or interests are sought to be affected.
Ord. LV., r. 3 (f)	the approval of any sale, purchase, compromise, or other transaction ;	
Ord. LV., r. 3 (g)	the determination of any question arising in the administration of the estate or trust ;	
Ord. LV., r. 4 (a)	the administration of the personal estate of the deceased ;	the executor, administrator, or trustee, and the residuary legatees, or next-of-kin, or some of them.

Source of jurisdiction.	Subject of application.	Parties to be served.
Ord. LV., r. 4 (b)	the administration of the real estate of the deceased ;	the executor, administrator, or trustee, and the residuary devisees, or heirs, or some of them.
Ord. LV., r. 4 (c)	the administration of the trust.	the executor, administrator, or trustee, and the <i>cestuis que trustent</i> , or some of them.
Ord. LV., r. 5A	Foreclosure and redemption of mortgages, whether legal or equitable, with ancillary relief, other than an order for personal payment by the mortgagor.	the mortgagee and all persons interested in the equity of redemption.
Ord. LV., r. 9c	Applications under s. 14 (2) of the Finance Act, 1894, as to the proportion of estate duty to be borne by any property or person.	as the circumstances may require.
Ord. LIVa., r. 1	Any question of construction arising under a deed, will, or other written instrument ( <i>i.e.</i> , not necessarily in the administration of an estate or execution of a trust).	as the Court may direct.
Ord. LV., r. 2 (1)	Applications for payment or transfer of funds in court <i>when there has been a judgment or order declaring the rights, or where the title (scil. of the payees or transferees) depends only upon proof of the identity, or the birth, marriage, or death, of any person.</i>	as the circumstances may require, having regard to the credit or account to which the funds are standing.
Ord. LV., r. 2 (2)	Applications for payment or transfer of funds in court not exceeding the value (if stock, the nominal value) of £1000.	
Ord. LV., r. 2 (3)	Applications for payment of the dividends on any securities in court, irrespective of amount.	
Ord. LV., r. 2 (12)	Applications as to the guardianship and maintenance or advancement of infants.	as the circumstances may require.



It must be understood that the foregoing list does not pretend to exhaust the matters which may form the subject of proceedings instituted by way of originating summons ; and, in particular, this form of procedure has by sundry statutes, including (among many others) the Solicitors Act, 1843, the Conveyancing Act, 1881, the Settled Land Act, 1882, and the Arbitration Act, 1889, been made available to enforce various provisions therein contained.

As regards the form of the summons. Where the application is made *ex parte*, as it frequently is, *e.g.*, in cases of the guardianship and custody of infants, the summons merely states the day and hour when it is returnable, and, as shortly as possible, the nature of the relief sought ; the facts upon which the claim for relief is founded being disclosed, in any application by originating summons, only by the evidence. Where there is a respondent to be served, there are a few cases, among which may be noted applications under the Solicitors Act, 1843, and the Arbitration Act, 1889, in which the respondent is not required to enter an appearance. In such cases, the form differs from that last mentioned in no substantial respect, except that the respondents are named in it. In the great majority of cases, the respondents are named in the summons, and warned that they must enter appearance within eight days after service ; in much the same way as in a writ of summons. Here again, the summons proceeds to state concisely the nature of the relief sought.

*Issue of summons, and appearance.*—The summons is in all cases issued and assigned by ballot to a particular Judge at the Writ Department of the Central Office ; and, where no appearance is required to be entered, the date and hour when the summons is returnable are immediately afterwards inserted and authenticated by seal on application at the Master's chambers. Where an appearance is necessary, the date of the return cannot be fixed until either all

appearances have been entered, or the time for entering appearance has expired. If any respondent makes default in appearance, the applicant must obtain from the Central Office, upon production of an affidavit of service, a certificate that no appearance has been entered; and, when the applicant is in a position to account for each respondent by producing either a memorandum of appearance or a certificate of no appearance, he may bring into the Master's chambers for sealing a Notice in the prescribed form, fixing the day and hour for attendance. This Notice must be served on each respondent not less than four clear days before the return day; the service being effected, as regards respondents who have failed to enter appearance, by filing a copy at the Central Office. On the return of the summons, the applicant must be prepared to produce an office copy of any Notice so filed; and, in order to avoid the necessity of filing further Notices, he should see that the summons is adjourned (if at all) to a particular day and hour. Where a respondent who has entered appearance fails to attend on the return of the summons, the hearing must be adjourned to enable the applicant to file an affidavit of service of the Notice; but may then proceed in the absence of such respondent. With regard to the service of originating summonses upon infant and lunatic respondents, the practice is the same as in actions commenced by writ of summons (pp. 489-490).

*Where returnable.*—In the Chancery Division, every summons, whether originating or ordinary, is invariably returnable in the first instance in the Master's chambers. With the exception of summonses for time, and a few other applications of secondary importance, which may be heard by one of the Master's clerks, the summons is always returnable before the Master himself, and never in the first instance before the Judge, either in chambers or in court. On the

return of the summons, the Master will see that the evidence which the parties may desire to file is complete, and will, if necessary for this purpose, adjourn the hearing from time to time, fixing successively the times within which each party is to file his evidence. The evidence is given exclusively by affidavit; but any party may, if so advised, apply for an order that any other person who has made an affidavit be required to attend for cross-examination. Such an application is made by ordinary summons; and the examination, if ordered, usually takes place before one of the Examiners of the court, who, on completing the examination, transmits the depositions to the Central Office, where they are filed. On the subsequent hearing of the principal summons, which will have been adjourned pending the examination, an office copy of the depositions will be produced by the party on whose application the examination was ordered. When evidence is taken by affidavit any party desiring to cross-examine a deponent may serve a notice in writing upon the party by whom the affidavit has been filed requiring the production of the deponent for cross-examination at the trial; and unless the deponent is so produced, his affidavit cannot be used as evidence unless by special leave of the Court (O. XXXVIII, r. 28).

In some cases, the Master has no power to dispose of the application himself, but must, when satisfied that the evidence is complete, adjourn it to the Judge, either in chambers or into court. Among other instances of such cases, may be mentioned all applications under Order LV., r. 3, involving any questions of construction of a document or of law, also all applications for the appointment of a new trustee (not being merely a trustee for the purposes of the Settled Land Acts), or for a vesting or other order consequential on such appointment, or for general administration,

or for the execution of a trust, or for accounts or inquiries concerning the property of any deceased person, or other property held in trust, or the parties entitled to such property. There are other instances in which the Master is by the Rules expressly deprived of the power to dispose of the case himself ; and, in addition, the Judge may give directions that any particular class of case is to be heard by him personally. In all other cases, the Master may at his discretion either make such order as he may think right, or adjourn the matter to the Judge in chambers or into court, either with or without the request of any party. Moreover, in every case, any party so desiring is entitled to have any question brought before the Judge in person ; and this, generally speaking, without any practical risk of being ordered to pay the costs of the adjournment if successful.

The question whether the adjournment should be into court or to the Judge in chambers depends mainly upon the nature of the application, and whether or not it is desirable that it should be publicly reported. The principal differences between the two methods of hearing are : that cases heard in chambers are not reported, the hearing being private, and that any party desiring to appeal to the Court of Appeal from a decision in chambers must, unless the Judge grants a certificate that no further argument is required, either have the matter adjourned into court for further argument, or move in open court to discharge the order, before he can serve notice of appeal. If the order ultimately made upon the originating summons is such as to require further proceedings to be taken in chambers, the subsequent procedure is precisely similar to that which has been described above in connection with actions commenced by writ of summons (pp. 561-579).

*Summons for directions inappropriate.*—The pro-



cedure by originating summons is intended to provide a simple and summary method of administering justice in suitable cases ; and, consequently, the Court has always been loath to entertain any subsidiary applications corresponding to the various interlocutory applications which are common in actions commenced by writ of summons, and necessarily tend to complicate the proceedings. It is true that any party to an originating summons may, if so advised, issue a summons for directions under Order XXX. ; and an order for discovery or for cross-examination of witnesses might, no doubt, be obtained in this way. But such orders are very rarely sought in matters commenced by originating summons, and then usually by ordinary summons ; and cases in which a summons for directions could reasonably be issued must be exceedingly rare. Occasionally a subsidiary application may be necessary to remove the next friend of an infant plaintiff, or the guardian *ad litem* of an infant defendant ; but it is at least doubtful whether such an application could be made by notice under the summons for directions. Generally speaking, therefore, the whole matter in dispute is settled upon the hearing of the originating summons itself, without subsidiary applications of any kind.

In actions against executors, administrators, or trustees, founded on breach of trust or wilful default, or where the plaintiff, owing to their failure to render accounts, desires to make the defendants personally liable for the costs of the proceedings, it is generally dangerous to proceed otherwise than by writ ; notwithstanding the jurisdiction to order accounts, etc., on originating summons. For the Court has no power, except by consent, to make on originating summons an order for administration founded on breach of trust or wilful default (*Dowse v. Gorton* [1891] A. C., at p. 202) ; and, consequently, in the common case

where the plaintiff, being in total ignorance of the defendants' dealings with the estate, obtains an order for accounts upon originating summons, and upon taking the accounts (perhaps at considerable expense), it appears that the defendants have been guilty of breach of trust or wilful default, the costs of the proceedings, including those of the defendants, will nevertheless usually, if the breach of trust is in the meantime made good, be ordered to be paid out of the estate, that is, out of the plaintiff's pocket, if, as commonly happens, he is beneficially entitled to the residue. In cases of administration of estates or execution of trusts, the Court has express power to order the application to stand over for a certain time, and that the defendants do in the meantime render to the applicant proper accounts ; with an intimation that if this is not done the defendants may be ordered to pay the costs of the proceedings. But it is dangerous, in circumstances such as those indicated above, to place much reliance on this provision.

(ii) *Originating motion* is the method prescribed by various statutes for instituting proceedings to enforce particular provisions thereby enacted. Among the cases of commonest occurrence, may be mentioned applications under the Companies (Consolidation) Act, 1908, to rectify the register of members, and for relief from omission to register contracts and mortgages ; and under the Infants' Property Act, 1830, to sanction the surrender and renewal of leases vested in infants.

The notice of motion, which states concisely the nature of the relief sought, and, by a note at the foot, the names, etc., of the respondents to be served, must in the first place, like an originating summons, be assigned by ballot to a particular Judge at the Writ Department of the Central Office. The respondents

are not required to enter appearance ; but they must, of course, be served personally with the notice, and, in the absence of any special provision to the contrary in the Act regulating the proceedings, or in the Rules, two clear days' notice is sufficient. The motion is heard in open court ; and the procedure, so far as the circumstances admit, is identical with that described above (pp. 555–556), in connection with interlocutory motions in actions commenced by writ of summons.

(iii) *Petition* is not now nearly so common a method of instituting proceedings as it was before Order LV. had rendered the more economical procedure by originating summons available for the extensive range of business which has been noticed above. A substantial part of this business would formerly have been the subject of proceedings originated by petition ; but now a petition is seldom necessary, except in cases of dealings with funds in court, when the order required cannot be obtained by summons under Order LV., r. 2 (p. 588), and under particular statutes which require that form of procedure. Among the more important cases falling within the latter class, may be mentioned, all applications under the Trustee Act, 1893, except such as can be made by summons under Order LV. ; applications under s. 4 of the Railway Companies Act, 1867, for the appointment of a receiver and manager by way of execution ; under s. 47 of the Companies (Consolidation) Act, 1908, to sanction a reduction of capital, and, under ss. 9 and 264 of the same Act, to sanction an alteration of the memorandum of association ; under the Lands Clauses Act, 1845, to deal with funds paid into court under the Act ; under the Patents and Designs Acts, 1907 and 1919, for revocation of a patent ; and under various statutes relating to charities, e.g., the Charitable Trusts Acts, 1853 and 1869.

As regards form, a petition differs considerably from an originating summons ; inasmuch as, while the latter states only as concisely as possible the relief sought, a petition begins by stating, like a statement of claim, in numbered paragraphs, the whole of the material facts upon which the application is founded, and concludes with a ' prayer ' stating the relief sought, as in an originating summons. At the foot of the petition, there must be a statement of the persons intended to be served therewith, or, if such be the fact, that no person is intended to be served ; and, in the absence of special leave to the contrary, two clear days must elapse between the service and the day fixed for the hearing of the petition.

The petition is presented at the office of the Registrars of the Chancery Division, where it is assigned to a particular Judge ; and a day is fixed for the hearing, which takes place in open court. The evidence is given by affidavit ; and, as regards the hearing, the practice is generally similar to that described above (pp. 555-556) in connection with motions. Where, as often happens, it is necessary for the Court, on the hearing of the petition, to direct accounts to be taken or inquiries to be made in chambers, it is now usual to adjourn the further hearing of the petition itself, until the result of the accounts and inquiries has been certified by the Master. But, substantially, the practice as regards the further hearing is identical with that described above under the heading of ' further consideration ' (pp. 578-579).

#### NOTE ON AUTHORITIES.

[*Rules of Supreme Court, and notes thereon in the " Yearly Practice " ; Daniell, " Chancery Practice."*]



## CHAPTER XXIX.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND  
ADMIRALTY DIVISION.

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THIS division consists of two Judges, one of whom is known as the President ; and, in treating of the proceedings in the division, it is necessary to consider separately the three different kinds of business assigned to it by the Judicature Act, 1873.

## I. PROBATE PROCEEDINGS.

The ecclesiastical courts had, as has been said, jurisdiction in relation to the granting or revoking of *probate* of wills and of *letters of administration*. This business was taken away from them by the Court of Probate Act, 1857, and vested in the Court of Probate created by that Act. By the Judicature Act, 1873, the jurisdiction of the Court of Probate was transferred to, and vested in, the High Court. For the more convenient distribution of business in the High Court probate business was assigned to the Probate, Divorce, and Admiralty Division.

We have already discussed (see Vol. II., Chaps. XIII., XXXIII., XXXIV.), the circumstances in which a title to the real and personal property of a deceased person is obtained both under a will and upon an intestacy ; and we are now concerned only with the machinery by which that title is established and authenticated by law, so as to place the persons so entitled in a

position to deal with the property of the deceased. It is the business of the Probate Division (as we shall find it convenient to call it) to give a title (*i.e.*, evidence of the right to represent a deceased person and to deal with his property) to representatives of any person, whether a British subject or not, who has died anywhere, leaving any personal or real estate situate in England or Wales, or any personal estate subsequently brought into England or Wales. Since the passing of the Land Transfer Act, 1897, estates of inheritance in land, other than legal estates in copyholds, vest, as we have seen, in the personal representatives. The primary business, therefore, of the Probate Division is to grant probate, if the deceased has made a valid will, or letters of administration, if he has died intestate, or if he has made a will without appointing an executor, or has appointed a person unwilling or unable to act, or who has died before him, or after him but before completing his duties as an executor, and without himself leaving an executor. Where the deceased has made a will, the court has to decide which one or more of his testamentary documents, if more than one, should be admitted to probate as constituting his will, and to ascertain whether an executor, willing and able to act, has been appointed by the will. If the deceased has not made a will, or has not appointed an executor or a person willing and able to act as executor, the court has to determine who should be appointed to administer the estate (Vol. II., pp. 598-603). In most cases, there is no dispute about these matters. The business, therefore, of the court is mainly non-contentious or *common form* business; and this is transacted by the Registrars of the court or their subordinates, at the Principal Probate Registry at Somerset House, London, or at a District Registry elsewhere. From them probate in common form, or letters of administration, may be obtained by or on behalf of personal representatives on *ex parte* applica-

tion, supported by the necessary evidence upon affidavit, in manner already described (Vol. II., pp. 630–633).

As regards the contentious business of the court, there are three kinds of action which may be brought in the Probate Division, viz. (i) an action to prove a will in solemn form, *i.e.*, *per testes*, (ii) an action to revoke a grant of probate or of letters of administration, and (iii) an action to establish a claimant's title to a grant of letters of administration. The conduct of these actions is governed by the Probate Rules (Contentious Business), in conjunction with the Rules of the Supreme Court.

An action to prove a will in solemn form is usually brought by the executor of the will propounded ; but it may be brought by a legatee or devisee. The object of an action for revocation of probate is to compel the party who has obtained probate to propound the will ; and in the result the suit becomes an action for proving the will in solemn form, or for pronouncing against it, or for proving in solemn form another will set up in opposition to that of which probate has been granted.

An action for a grant of administration is called an *interest suit*, and is generally brought where the claimant's right to be appointed administrator depends on questions of legitimacy or pedigree. An action for revocation of letters of administration is brought against the person to whom they have been granted ; and its object is to compel him to establish his title to the grant. The result is that the action becomes an 'interest suit.'

If any person, such as any next-of-kin or the heir, having an interest in the estate of a deceased person, desires to oppose the grant of probate or of letters of administration, he must enter in the Principal or a District Registry (as the case may be), a *caveat*. A *caveat* is a formal notice to the Registrar, lasting in the first

instance for six months, and then capable of renewal, and demanding that nothing be done in relation to the goods of the deceased, unknown to the party who has lodged the *caveat* ; inasmuch as he (the 'caveator') is a party interested in the estate. The person whose application for a grant is interfered with by the *caveat*, then applies at the Principal Registry for a form of summons, called a 'warning,' against the 'caveator.' The warning is served on the caveator, and requires him to enter an appearance within six days at the Registry, and set forth his interest in the estate. If the caveator fails to appear, the grant asked for will be issued to the applicant, upon his filing affidavits of the service of the warning upon the caveator, and of search for appearance of the caveator and of his non-appearance.

If the caveator does appear to the warning, the matter is entered as a cause in the Court Book ; and the contentious business is held to have thereupon commenced.

A writ is then issued, after an affidavit has been filed verifying the endorsement on the writ. A citation is also sometimes necessary ; and this is, in general, a command issuing from the Principal Registry, ordering the party against whom it is issued, and on whom it must be served, to appear and do what is required of him—as, for example, to accept or refuse probate or administration, or to bring in the probate or letters of administration, if already granted, or it may be simply 'to see proceedings,' that is to say, to become a party to the suit, in order that the decree of the Court may be binding on him.

*Action to prove a will in solemn form.*—As this kind of action is the most common and important instance of contentious probate business, it may be useful to give an account of its object and procedure. If it appears likely that the validity of a will may be disputed,



or if, for any other reason, the ordinary grant of probate is not suitable to the circumstances of the case, the executor named in the will proceeds to propound it *in solemn form, i.e., per testes*. This process is, virtually, an action against all persons likely to dispute the will.

The writ is endorsed with a claim by the plaintiff, as the executor of the last will of the deceased, to have the will established (R.S.C., O. III., r. 5). The endorsement will have been verified by affidavit; and frequently it is ordered to stand as a statement of claim, in which case the defendants, after appearance, plead to it accordingly.

*Defences.*—The defendants may raise any or all of the following defences:—

- (i) that the will was not duly executed according to the provisions of the Wills Acts, which we have already discussed (Vol. II., pp. 619–625);
- (ii) that the deceased was not of sound mind, memory, and understanding, at the time of the execution of the alleged will;
- (iii) that the execution of the will was obtained by undue influence;
- (iv) that the execution of the will was obtained by fraud, or that some portion thereof was inserted through fraud or forgery;
- (v) that the deceased, at the time of the execution of the will, did not know and approve of the contents;
- (vi) that the document was not intended to operate as a will;
- (vii) that the alleged will has been revoked.

The defendant may also allege, by way of *counter-claim*, that he is the executor of a later will of the deceased, or of an earlier will, which has not been revoked; and, in these circumstances, he may pray that the will propounded may be pronounced against,

and that probate of the will which he is setting up may be granted in solemn form.

The forms essential to the validity of a will, and the general legal capacity of different classes of persons to make wills, have already been explained (Vol. II., pp. 615-625); but it may be well to explain very briefly the second and third of the defences above mentioned.

*Mental Capacity.*—With regard to the testator's capacity to make a will, three essentials are requisite:—

- (i) He must understand the nature of the act of making a will and its effect.
- (ii) He must understand the extent of the property of which he is disposing.
- (iii) He must be able to comprehend and appreciate the claims to which he ought to give effect (*Banks v. Goodfellow* (1870) L. R. 5 Q. B., at p. 565).

The mental capacity of a testator is not *ipso facto* extinguished by the mere existence, in his mind, of insane delusions. The delusions must be such as did or might influence him in the disposal of his property, for instance, by poisoning his affections, or perverting his sense of right. Thus, a man with a delusion that he has no heart, may nevertheless be competent to make a will; on the other hand, a man with a delusion that his wife intended to murder him, might be found to be so biassed as to be incompetent to make a will containing any proper provisions for her.

*Undue influence.*—This defence means more than that the testator was very greatly under the influence of another, and may be illustrated by a passage from Williams *On Executors* (11th ed.), p. 30:—"The influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of

“another, for that would be a very strong ground  
 “in support of a testamentary act; further, there  
 “must be proof that the act was obtained by this  
 “coercion; by importunity which could not be resisted;  
 “that it was done merely for the sake of peace; so  
 “that the motive was tantamount to force and fear.”

*Substance of the case.*—It is a peculiarity of probate actions that, with every defence, there must be delivered a document which is called the ‘Substance of the Case’ (R. S. C., O. XIX., r. 25 (a)). This is a short outline of the facts on which the defendant intends to rely. Where, moreover, a party has pleaded that the deceased was insane when he made the will, particulars of specific instances of delusion must be given before the case is set down for trial; and the party who has pleaded unsoundness of mind will not be allowed at the trial to give evidence of instances of delusion not disclosed in his particulars.

Sometimes the defendant, in his defence, merely insists upon the will propounded being proved in solemn form; thereupon, he serves upon the plaintiff with his defence a notice to that effect, also intimating to the plaintiff that he only intends to cross-examine the witnesses produced in support of it. In that event, the defendant will not be ordered to pay the plaintiff’s costs; unless the judge at the trial is of opinion that there was no reasonable ground for opposing the will.

*Affidavit of scripts.*—Within eight days of the appearance of the defendant, each party to the action is required to file an affidavit of scripts, setting out all the testamentary papers of the deceased, executed or unexecuted, including drafts of and written instructions for wills and codicils, which he has in his possession or power; and a party is not allowed to inspect the affidavit or the scripts of another party until he has filed his own affidavit.

In consequence of the wide nature of the issues which may be raised in a probate action, the Court exercises a greater latitude in ordering discovery of documents than in other actions in the High Court, and usually orders discovery of all documents which may throw any light on the issues of fact raised in the defence and Substance of the Case, especially where incapacity, fraud, or undue influence is alleged ; because the function of the Court is to give effect to the properly expressed wishes of the deceased as to the disposal of his property, and not merely to do justice between the parties to the action.

*Mode of trial.*—After the pleadings are closed, the action is set down for trial, and is tried by the Judge alone, unless ordered to be tried with a jury. Where the only question is, whether the will was duly executed, the action is tried without a jury ; but where the issues raised are that the will was obtained by undue influence or fraud, or that the testator had not testamentary capacity, the action is usually, on the application of either party, ordered to be tried with a jury. Section 2 (1) (b) of the Administration of Justice Act, 1920, expressly preserves such right as the heir-at-law, when a party, may have had, if he so insists, to have any issues of fact tried with a jury.

*Judgments.*—The judgment or decree pronounces in favour of the will, which is then admitted to probate in solemn form, or pronounces against it. The costs are in the discretion of the Judge, who may order them, or any part of them, to be paid out of the estate of the deceased, or any portion of it ; and an executor who propounds the will in an action for proof in solemn form is often allowed his costs out of the estate, whether he succeeds or not. But there is no rule which prevents the Court from ordering an unsuccessful executor to pay the costs of the action. The general rule is that costs follow the event, and



that the unsuccessful party must pay the costs of the action; though this rule is relaxed in his favour, where the litigation has been caused by the confusion or uncertainty in which the deceased left his testamentary papers, or if there were reasonable grounds for questioning the execution of the will, or the testator's capacity. In these cases the Judge may, in the exercise of his discretion, order the costs to be paid out of the estate.

An appeal lies from the judgment in a probate action to the Court of Appeal, and from thence to the House of Lords, in the same way as from a judgment in an action tried in the King's Bench Division (pp. 544–546).

*Effect of probate in solemn form.*—The advantage of proving a will in solemn form is, that probate merely in common form, obtained at a Registry without notice to persons who may be benefited under an intestacy, such as the heir-at-law or the next-of-kin, is liable to be revoked at any subsequent date (or, as some writers assert, within thirty years), if any such person can prove to the Court that the will was not duly executed, or that the testator was not of sound mind, or the like. If, on the other hand, the will is to be proved in solemn form, it is necessary, before probate is granted, that all persons who are interested in the estate of the deceased, should be cited, that is to say, brought before the Court. The decree pronouncing in favour of the will propounded is then binding on all such persons, and is irrevocable; unless a valid will of later date is subsequently discovered, or the decree is shown to have been obtained by fraud.

## II. DIVORCE PROCEEDINGS.

Until the year 1857, the business of the Divorce Court, like that of the Probate Court, was transacted

by the ecclesiastical tribunals ; but in that year their jurisdiction over these matters, except so far as relates to the granting of marriage licences, was taken away by statute, and transferred to the Court for Divorce and Matrimonial Causes. By the Judicature Act, 1873, the jurisdiction of this Court was transferred to, and vested in, the High Court ; and its business was assigned to the Probate, Divorce, and Admiralty Division.

Proceedings are commenced by filing a *petition*, praying for a decree of (a) restitution of conjugal rights, or (b) judicial separation, or (c) nullity of marriage, or (d) jactitation of marriage, or (e) for a declaration of legitimacy or the validity of a marriage, or (f) for a decree of dissolution of marriage (commonly called 'divorce'). The general nature of the relation of husband and wife has been set out in an earlier part of this work (Vol. I., Chap. XVI.) ; and we are now concerned with the more important features of the proceedings available for the enforcement of certain rights connected with that relation.

(a) *Restitution of conjugal rights*.—In a suit for the restitution of conjugal rights, which may be instituted by either party to the marriage, the Court has power to order one of the parties to the marriage, who has left the other, to return to cohabitation. Before this order can be obtained, it is necessary for the injured party, or some person on his or her behalf, to write a friendly letter asking the other to return ; and if there is a refusal or failure to return, the Court will make an order for restitution of conjugal rights. If the respondent fails to comply with the order, he or she is deemed to have been guilty of desertion without reasonable cause (often called 'statutory desertion') ; and a suit may be forthwith commenced for judicial separation, or, a wife, if her husband has committed adultery, may petition for dissolution of

the marriage (Matrimonial Causes Act, 1884). But an order for the restitution of conjugal rights will not be enforced by attachment for disobedience.

(b) *Judicial separation*.—This may be obtained by either party to the marriage, on the grounds of adultery, or cruelty, or desertion without cause for two years and upwards, or statutory desertion under the Matrimonial Causes Act, 1884, by failure to comply with a decree for restitution of conjugal rights. A decree of judicial separation is similar in effect to the former ecclesiastical decree of divorce *a mensâ et thoro*; it does not dissolve the marriage, and does not set the parties free to marry again. Orders having the effect of a judicial separation may also be obtained in a summary way by a married woman whose husband has been guilty of one or more specified kinds of cruelty towards her, or of desertion or of wilful neglect to maintain her or her infant children, and has thereby caused her to leave him and live apart from him, or by a husband or a wife in the case of the habitual drunkenness of the other. But these orders are obtained from the magistrates' courts under the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902, s. 5, and not from the Divorce Division.

(c) *Nullity of marriage*.—A marriage may be declared null and void on the grounds of impotence, consanguinity, affinity, bigamy, want of consent, or of non-compliance with the requirements of the *lex loci contractus* as regard the validity of the marriage.

(d) *Jactitation of marriage*.—A suit for jactitation of marriage is brought about by a false boasting of one of the parties that he or she is married to the other; whereby a common reputation of their marriage may ensue. If the petitioner succeeds in the suit, the respondent will be ordered to keep perpetual silence in the matter. Suits of this kind are very rare.

(e) *A declaration of legitimacy*, or of the validity of a marriage, or that the petitioner is a natural-born subject, can be obtained on petition under the Legitimacy Declaration Act, 1858, by any person domiciled in England or Ireland, or by any person who claims real or personal estate in England, whose legitimacy is in question; provided that he is a natural-born subject, or that his right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of the marriage of his parents or grandparents. The petitioner can also obtain a declaration of the validity of his own marriage. The Attorney-General must be made a respondent to the petition.

(f) *Proceedings for dissolution of marriage*.—These proceedings form so large a proportion of the work of the Divorce Division, that we shall devote to them almost the whole of the remaining pages available for this subject.

A husband may obtain a dissolution of his marriage on the ground of his wife's adultery.

A wife, on the other hand, cannot obtain a dissolution on the ground only of her husband's adultery; the available grounds in her case being (i) adultery of her husband coupled with (a) such cruelty as, without adultery, would entitle her to a judicial separation, or (b) with incest or bigamy, or (c) with rape, or (d) with desertion for two years or upwards without reasonable excuse, or (e) with statutory desertion, that is, failure to comply with an order of the Court to return to co-habitation made under the Matrimonial Causes Act, 1884 (p. 606); (ii) another ground is the husband's unnatural crime.

Proceedings in a suit for divorce are commenced by filing at the Divorce Registry, at Somerset House, a *petition*, signed by the petitioner, in which the following particulars must be set out:—(1) where and when the



parties were married, and where the parties have since cohabited ; (2) the issue, if any, of the marriage, with names and ages ; (3) the description and place of residence of the husband, and the domicile of the parties as at the date of the petition ; (4) whether there have been any and, if so, what, previous proceedings in relation to the marriage in the Divorce Division ; (5) a general charge stating the matrimonial offences relied on ; (6) specific instances of such offences, with the dates when, the places where, and the person with whom they were committed, who, if made a party to the proceedings, will be the ' co-respondent ' ; and (7) the amount of damages, if any, claimed against the co-respondent. The petition then concludes with a prayer that the marriage be dissolved, and that the petitioner may have the custody of the children, if any. The petition must be verified by affidavit, in which the petitioner must swear to the truth of the statements in the petition, in so far as they are facts within his or her personal knowledge, and to his or her belief in the truth of such statements as are not within personal knowledge. The affidavit must further state, that no collusion or connivance exists between the petitioner and the other party to the marriage.

The Court will not grant a divorce unless satisfied that the spouses are domiciled within the jurisdiction of the court (*Le Mesurier v. Le Mesurier* [1895] A. C. 517). If the petitioner is the husband, he, whatever his nationality, must have made England his permanent home, and to England, whenever absent from it, he must intend sooner or later to return. The court is a court for England only, not a court for the United Kingdom, or even Great Britain. For the purposes of jurisdiction, Ireland and Scotland are deemed to be foreign countries equally with France and Spain ; and so also are the Channel Islands and the Isle of

Man. Wales is, of course, for this, as for most legal purposes, part of England.

A wife's domicile is deemed to be the same as that of her husband ; for on marriage she acquires his domicile, so that, in a petition by a wife, the domicile of the respondent is the important factor. This state of the law as regards the domicile of the wife is sometimes the cause of hardship to her ; unless the Court finds reason (as it occasionally does) to hold that she has regained her English domicile (*De Montaignu v. De Montaignu* [1913] P. 154).

The petitioner, after filing the petition and affidavit in support, must then extract a citation, signed by one of the registrars of the court, calling upon each person charged to appear and make answer to the petition. A copy of the citation must be served personally, together with a sealed copy of the petition, on the respondent and co-respondent (if any) ; and, if that cannot be done, application must be made to the Court, by motion founded on affidavit, for leave to proceed by substituted service. The citation may be served out of the jurisdiction without leave.

If the petitioner is the husband praying for a dissolution of his marriage on the ground of his wife's adultery, every alleged adulterer *must* be made a co-respondent ; unless the Court gives leave to proceed without doing so. And if damages are claimed, the alleged adulterer *must* be served with the citation ; unless the Court directs otherwise. If the wife is a petitioner praying for a dissolution on the ground of adultery, the Court may order any woman accused of adultery with the husband to be made a respondent, or may give her leave to intervene.

After service of the citation, the respondent and the co-respondent (if any) may enter an appearance in the Divorce Registry, and may then file, in the Registry, their *answers* to the petition. If the answers contain

any counter-charges, or if the co-respondent alleges that he did not know that the respondent was a married woman, an affidavit must be filed with them verifying the facts alleged. The affidavit of the respondent must also state that there is not any collusion or connivance between the respondent and the petitioner; but the co-respondent is not required to depose as to collusion or connivance.

Where the answers contain any counter-charge, the petitioner may file a *reply* without leave; and the Court may direct that any person with whom the husband is alleged to have committed adultery be made a respondent, and that any person charged with misconduct be allowed to intervene. A respondent may always seek a dissolution of the marriage or any less relief, by means of a cross-petition, or by a prayer for such relief in the answer filed by him or her.

The defences to the petition may be divided into two classes: first, *absolute bars*, which, if established, are a complete answer to the petition, so that the Court is bound to dismiss the petition; second, *discretionary bars*, which, if established, are not a complete answer, but leave to the Court a discretion as to granting or refusing the decree.

There are three absolute bars (besides disproof of the petitioner's case), viz.: *connivance*, *condonation*, and *collusion*.

(i) *Connivance*.—This means an actual *corrupt* acquiescence beforehand by the petitioner in the respondent's guilt.

(ii) *Condonation*.—This is a “forgiveness of the “conjugal offence with the full knowledge of all the “circumstances; and is a question of fact, not of “law.” It is a “blotting out of the offence, so as to “restore the offending party to the same position he “or she occupied before the offence was committed” (*Keats v. Keats* (1859) 1 Sw. and Tr. 334), but subject

to a condition, express or implied, that there shall be no further matrimonial offence (unless the forgiving party expressly excludes any such condition). Mere forgiveness is not condonation; it is necessary that there should be a resumption of co-habitation so as to restore the offending party to his or her former position (*Crocker v. Crocker* (1920) 36 T. L. R. 216).

A continuance of marital intercourse after knowledge that adultery has been committed, will justify the inference that the offence has been condoned; but a subsequent matrimonial offence of the same, or of a different kind, may revive a matrimonial offence previously condoned.

(iii) *Collusion*.—This means an agreement between the parties as to the presentation or prosecution of a petition, whereby they make a bargain as to the withholding, or the disclosure, or the manufacture, of evidence in the case (*Churchward v. Churchward* [1895] P. 7); as, for example, that the respondent shall abstain from defending the suit. But the mere fact that both parties want a decree of dissolution of marriage does not amount to collusion. The King's Proctor may intervene on the ground of collusion, and bring the facts to the attention of the Court during the progress of the suit, or at any time before a decree *nisi* is made absolute.

There are five discretionary bars, viz. :—

- (i) *Adultery of the petitioner.*
- (ii) *Unreasonable delay* in presenting the petition.
- (iii) *Cruelty of the petitioner.*
- (iv) *Desertion, or wilful separation without excuse* by the petitioner, before the alleged adultery; and
- (v) *Wilful neglect or misconduct*, actually conducting to the adultery complained of.

A few words must be said about each of these.



(i) *Adultery of the petitioner*.—The adultery must have been committed subsequent to the marriage; for all offences of this kind committed previously are obliterated by the marriage. The Court, although by statute it has a discretionary power, will not readily grant a divorce to a person who is proved to have committed adultery; but it will exercise this power, usually in favour of the wife, in three classes of cases:—

(a) Where there has been a mistake of law; as, for example, where the petitioner, having obtained a decree *nisi*, marries again, before the decree has been made absolute, believing that the marriage was dissolved by the decree *nisi*.

(b) Where there has been a mistake of fact; as, for example, where one of the parties to the marriage, believing that the other party is dead, marries again.

(c) Where there are special circumstances; as, for example, where the wife has been compelled by her husband to lead the life of a prostitute.

The Court will not, however, exercise its discretion in favour of a petitioner guilty of adultery, unless the adultery is specifically set out in his or her petition, and the Court is therein asked to excuse it (*King v. King* [1915] P. 88).

(ii) *Unreasonable delay in presenting the petition*, which means an unreasonable delay after the discovery of the existence of the offence for which the divorce is claimed. Unless a satisfactory explanation can be given of such delay, the petitioner is not entitled to a divorce. Want of means, however, is generally considered a satisfactory explanation, though in view of the increased facilities for litigation by 'poor persons' (pp. 546–547) this excuse would appear to be of declining importance. Consideration for

the feelings of others, or for the welfare of a child, may suffice as explanations.

(iii) *Cruelty of the petitioner.*—By ‘cruelty’ is meant such conduct (not necessarily blows or other violence) as results in bodily hurt or injury to health, or produces a reasonable apprehension of such hurt or injury. The general, but not inflexible, rule is, that the cruelty, in order to constitute a bar to a decree of dissolution, must have been such as to lead to the misconduct complained of in the respondent (*Pryor v. Pryor* [1900] P. 157).

(iv) *Desertion or wilful separation.*—Desertion by the petitioner, when pleaded as a bar, need not have continued for the space of two years or for any specific period. The act relied on as desertion must, however, in all cases have been done in opposition to the wishes of the person who alleges it.

(v) *Wilful neglect or misconduct of the petitioner.*—The principle on which the Court acts is, that the neglect or misconduct, to operate as a bar, must *directly* conduce to the adultery complained of.

*Mode of trial.*—As regards the mode of trial, if damages are claimed by a husband from the co-respondent, the suit must be tried with a jury, and the damages assessed by it, even though the suit be undefended. In other cases, the cause is heard by the Judge alone, either in London or on circuit. But either party has a right to have any issues of fact tried with a jury, provided that an order for trial before a common or a special jury is duly obtained. This right is expressly preserved by section 2 (1) (b) of the Administration of Justice Act, 1920. When a defended cause is tried with a jury, the questions for the jury are settled before the trial by the Registrar.

If at the trial facts are established sufficient to entitle a petitioner to a dissolution, then, if there is no bar, the Judge must, or if there is a discretionary bar the Judge may, if he decides to exercise his discretion in favour of the party, pronounce a decree *nisi* in favour of the successful party. A decree *nisi* is an order that the marriage be dissolved, *unless* sufficient cause be shown why the decree should not be made absolute, within six months from the date of the decree *nisi*.

*Intervention by the King's Proctor.*—The King's Proctor, or any other person, wishing to show cause why the decree *nisi* should not be made absolute, may then do so on the ground that there has been collusion between the parties (see also p. 612), or that material facts were, either intentionally or accidentally, not brought before the Court, or that the petitioner has committed adultery since the date of the decree; and the King's Proctor may pray that the Court will rescind the decree *nisi*, and order the petition to be dismissed. If, during six months from the date of the decree *nisi*, no such step is taken, notice may be filed in the Registry by the successful party that the Court will be prayed to make the decree absolute; if no such notice is given within a reasonable time, the unsuccessful party is entitled to have the decree *nisi* revoked, and the petition dismissed for want of prosecution, but cannot apply to have the decree made absolute.

*Appeals.*—No appeal can be brought from a decree absolute by any party who, having had time and opportunity to appeal from the decree *nisi*, has not done so; but an appeal lies to the Court of Appeal, within three months from the date of the decree *nisi*, and thence to the House of Lords, within one month after the decision of the Court of Appeal. When the right of appeal has lapsed, either party is at liberty to marry again at any time after the decree absolute.

*Costs.*—A wife, whether petitioner or respondent, is

generally entitled to have the costs incurred by her, from the commencement of the suit up to the time of the case being set down for trial, taxed as between party and party, and paid by her husband before the trial. She is usually entitled also, when the case is so set down for trial, to compel her husband to pay into the Registry, or give security by bond, for a sum fixed by the Registrar as sufficient to cover her costs of and incidental to the hearing. If she succeeds at the trial, the general rule is that she gets her costs. If she fails, the sum paid into court or secured by the husband to cover her costs of the hearing is generally ordered by the Judge to be paid out to her solicitor, unless he or she has been guilty of misconduct in the suit; and, further, the Court has power, in special circumstances, to order that a guilty wife shall receive her actual costs, though they amount to more than the amount so paid into court or secured.

*Liability of co-respondent.*—A co-respondent may set up in his defence a denial of material facts alleged in the petition, or any other defence available to the respondent, and (as a plea to any damages claimed) that he did not know that the respondent was a married woman. But where the husband is successful in establishing a charge of adultery against the co-respondent, the Court generally orders the co-respondent to pay the whole or part of the costs of the suit, if he knew at the time of the adultery that the respondent was a married woman. The co-respondent is also liable to be condemned in damages, to compensate the petitioner for the loss or injury he has suffered by the breaking up of the home; and in assessing the damages regard must be had to the following among other factors: (i) the value of the wife to her husband, both in a pecuniary sense as contributing money or services in the upkeep of the household, and also as his companion; (ii) the extent



of the injury to his honour and feelings ; and (iii) the conduct both of the husband and of the co-respondent ; nor is the question of the rank and means of the co-respondent entirely irrelevant (*Butterworth v. Butterworth* [1920] P. 126, where the whole position of a co-respondent is exhaustively examined by McCardie, J.). The Court has power to order the whole or any part of the damages awarded by the jury to be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife. In the case of co-respondents, the jurisdiction of the Court does not depend on their domicile or nationality ; but they may be duly served wherever they may be, and execution can be had against them, at any rate so far as it is available in this country.

*Alimony and maintenance.* (i) *Alimony pendente lite*.—In a matrimonial cause, a wife, whether petitioner or respondent, may forthwith, after service of the citation upon her husband, or after the entry of appearance by her, petition the Court for *alimony pendente lite* (to be distinguished from the *permanent alimony* that may be granted after a judicial separation), for her support during the proceedings. On a petition for *alimony pendente lite*, the Registrar, unless the parties agree to a sum, will inquire into the facts. The husband may object that the wife has no need of alimony, *e.g.*, that she has separate estate, or is supported by the co-respondent, or that the husband has no income, or is bankrupt. But after inquiry, the Registrar will allot to her such a sum as he thinks fit, having regard to the circumstances of the case and to the conduct of the parties. This sum will usually be an amount not exceeding one-fifth of the joint incomes of husband and wife, or less if the husband's income is very large, or more if the wife has to support the children. It will be payable until decree absolute, if the wife succeeds, or until she is

found guilty of misconduct, if she is unsuccessful; but in the latter case it may be continued by the Judge pending an appeal. It is not assignable by her; and the Court has power to vary the amount if the circumstances alter.

(ii) *Maintenance*.—After decree *nisi* in her favour, but within one month after decree absolute, for dissolution or nullity, the Court may order the husband to secure to the wife to the satisfaction of the Court, a lump sum of money, or an annual payment for a period not exceeding her life, with or without a monthly or weekly sum during their joint lives. This payment will be such as, having regard to the means of the wife and the ability of the husband to pay, and the conduct of the parties, seems reasonable to the Court. Where circumstances subsequently change, the amount of periodical payments may be varied by the Court. Where an annual payment is ordered, it will usually be a sum not exceeding one-third of the joint incomes of husband and wife. It is not usual for the Court to decree maintenance in favour of a guilty wife; but, in exceptional circumstances, the Court will compel a husband to make her a small subsistence allowance.

(iii) *Permanent alimony*.—A wife who has obtained a decree of judicial separation, and even in special circumstances a guilty wife, is entitled to apply for a decree of permanent alimony; whereupon her application is dealt with on principles similar (except in respect of amount) to those governing the allotment of alimony *pendente lite*.

*Variation of marriage settlements*.—After a final decree of nullity or dissolution of marriage, the Court may inquire into the existence of settlements, ante-nuptial or post-nuptial, made on the parties to the marriage, and make such orders with reference to the application of the settled property as it thinks fit, for the benefit

of the children, or of either or both of the parties. The Court may also, where a wife has been divorced by her husband, order a settlement of her property, or part of it, for the benefit of the husband or children, or of both. An application to vary settlements is made by petition, which may be filed at any time after decree *nisi* or decree absolute, but will not be dealt with until the decree has been made absolute. The purpose of the variation of settlements is not to punish the guilty party, but to protect the interests of the innocent party and of the children of the marriage.

*Custody of children.*—The Court may also before, or in, or after, its final decree, make provision for the custody, maintenance, and education of the children of the marriage until they attain the age of twenty-one years; and such an order may include provisions for access to the children by the guilty parent.

### III. ADMIRALTY PROCEEDINGS.

Before the Judicature Act, 1873, the jurisdiction of the Admiralty Court rested mainly on the antient jurisdiction of the court (principally in cases of collision-damage, salvage, bottomry, and wages), and on the Admiralty Court Acts, 1840 and 1861, which extended the antient maritime jurisdiction of the court of the Lord High Admiral. From these main sources, and from others to be mentioned in due course, the court derives jurisdiction to try the following causes relating to ships :—(i) claims for damage done or received by any ship; (ii) claims for salvage remuneration for salvage services rendered to a ship or her cargo (and this jurisdiction was extended by the Merchant Shipping Act, 1894, s. 544, re-enacting previous statutory provisions, to claims for saving life from a ship); (iii) claims by seamen for their wages (extended by the Merchant Shipping Act, 1894, s. 167,

to include claims by the master of any ship for wages, or for disbursements made by him on account of the ship) ; (iv) claims to recover money lent on ' bottomry bond,' in respect of a ship, or money lent on a ' respondentia bond ' in respect of cargo (p. 259) ; (v) claims under towage contracts, for remuneration for towage services rendered to a ship ; (vi) claims to recover payment for necessities supplied to a foreign ship, or to any ship, British or foreign, when in a port to which she does not belong, and when no owner is domiciled in England or Wales when the suit is begun ; (vii) by the Administration of Justice Act, 1920, s. 5, claims (a) arising out of an agreement relating to the use or hire of a ship, (b) relating to the carriage of goods in any ship, or (c) in tort in respect of goods carried in any ship, provided that no owner or part owner of the ship is domiciled in England or Wales ; (viii) claims to recover possession of a ship, or to enforce other rights arising out of the ownership of a ship or share thereof ; (ix) claims to enforce rights arising out of a registered mortgage of a British ship ; (x) claims to enforce rights arising out of an unregistered or equitable mortgage of a British ship, or any mortgage of a foreign ship ; and (xi) claims to recover payment for building, equipping, or repairing any ship ; provided, in each of the two last-mentioned cases, that the ship is already under the arrest of the Court, or has been sold in some other previously instituted suit.

The jurisdiction in all the cases above mentioned may be exercised under the Acts by proceedings *in rem* or *in personam* ; that is to say, instituted against the *res* (ship, or cargo, or both, as the case may be,) or against the owner of the *res* personally. An action *in rem*, which is made effective against a ship by obtaining her arrest, after issue of a writ in an action *in rem*, is one in which the judgment may be enforced



by selling the ship, or proceeding against the bail given to release her from arrest. It is a distinctive and peculiar feature of Admiralty jurisdiction.

In the first four of the cases above mentioned, the claimant has a *maritime lien* (see pp. 228–229 and *The Ripon City* [1897] P., at pp. 242–3), which is a privileged claim attaching to the *res* to which it relates from the moment of the happening of the cause giving rise to the claim, and continuing to attach to it, notwithstanding any subsequent change of ownership (*The Bold Buccleugh* (1851) 7 Moo. P. C. 267), until the claim is satisfied; and it is enforceable by the arrest of the *res* in an action *in rem*. But the Maritime Conventions Act, 1911, s. 8, provides that collision and salvage actions must be brought within two years of the time of their accrual, or within such extended period as the Court may in any particular case appoint.

In the next three of the cases enumerated above, the claimant has not a maritime lien; but, by reason of the statutory provision above referred to, enabling him to enforce his claim by proceedings *in rem*, he has a statutory right *in rem*. Such a statutory right is merely a right to enforce a personal claim against the shipowner by arresting the ship to which the claim relates, and gives no lien on the ship; and the right to arrest is lost, if, between the date of the accrual of the claim and the date of the steps taken to arrest, the ship is sold, even if the sale be to a purchaser who has notice of the claim (*The Aneroid* (1877) 2 P. D. 189).

An action *in rem* may therefore be defined as a suit instituted against a ship or her cargo to enforce a maritime lien on it or a statutory right *in rem* against it, or to enforce rights arising out of the ownership or mortgage of a ship.

By the Judicature Act, 1873, the jurisdiction of the High Court of Admiralty was vested in the High Court.

For the more convenient distribution of business in the High Court, however, the maritime causes which were previously within the exclusive jurisdiction of the Admiralty Court, were assigned to the Probate, Divorce, and Admiralty Division. The jurisdiction of the Judge sitting to hear Admiralty cases in the Probate, Divorce, and Admiralty Division is, therefore, twofold. As a Judge of the High Court, he has all the powers and jurisdiction of any other Judge of the High Court ; and, subject to the power of transferring any action commenced in the Admiralty Division which ought under the Judicature Acts or the Rules to have been brought in either of the other divisions, he has a concurrent jurisdiction to try any action. In practice, however, the actions *in personam* commenced in the Admiralty Division relate to ships. Second, he has, in practice, an exclusive jurisdiction to try actions *in rem*, which previously could only have been brought in the Admiralty Court. The jurisdiction *in rem* of the Probate, Divorce, and Admiralty Division is the same as that of the High Court of Admiralty before 1875 ; it rests principally upon the provisions contained in the Admiralty Courts Acts, 1840 and 1861, and the Merchant Shipping Acts.

Most of the actions brought in Admiralty are either actions for damage by collision between ships, or actions for salvage ; and it may therefore be useful to explain and illustrate the peculiarities of Admiralty procedure by giving an outline of the various steps in an ordinary action *in rem* for damage by collision, and in an action for salvage.

(a) *Action in rem for damage by collision*.—The writ is issued out of the Central Office or a District Registry, after which it is taken to the Admiralty Registry, where an official number (called the ‘ folio ’ number) is assigned to the cause, and wherein subsequent proceedings originate. The parties are usually not

mentioned by name, but are described as ‘the owners’ of the respective ships. Unless the solicitor for the defendant owners gives an undertaking to accept service and to put in bail, the writ is served on the ship proceeded against, if she be within the jurisdiction, that is, in a port in England or Wales, or within three miles from the shore. After issue of the writ, the plaintiff may procure the issue of a warrant of arrest; whereupon the vessel will be arrested by the marshal of the Admiralty Court or his substitute. From the time the ship is arrested, she is deemed to be in the custody of the court; and it is a contempt of court, punishable by fine or imprisonment, to remove or interfere with her. She remains under arrest until her release, which may occur on bail being given for the amount of the claim and costs, or when the claim is satisfied, or is dismissed by the Court.

The defendants have frequently a cross-claim for their damage by the collision; and they may procure the arrest of the plaintiff’s ship by taking similar steps. But if they cannot do so, owing to her not being within the jurisdiction, or having been lost, the Court, in order to put them on an equal footing to the plaintiffs with regard to security, will stay the action until the plaintiffs give bail or other security for the counter-claim.

Bail in Admiralty actions is usually given in the form of a bond executed by two sureties, who undertake, in the event of the judgment not being satisfied, to pay the amount of it, not exceeding the sum fixed in the bond.

In every collision action, the plaintiff’s solicitor is required to file in the Registry within seven days after the commencement of the action, and the defendant’s solicitor within seven days after appearance, a most important document called a ‘Preliminary Act,’ containing a short statement of the material facts

relating to the collision ; and this document is sealed up, and is not open to the inspection of the opposite party until after the pleadings are completed. The object of a preliminary act is, that each party should soon after the occurrence, and at an early stage in the proceedings, set out his version of the facts, before he knows his opponent's version. Each party is bound at the trial by his preliminary act ; and the Court will not usually allow any material amendment of it.

Pleadings are usually delivered in a collision action, and consist of a statement of claim, defence, and frequently a counter-claim, and a reply to the counter-claim. Summonses are generally heard by the Registrar, from whom an appeal lies to the Admiralty Judge in chambers.

The action is tried by the Judge, assisted by two of the Elder Brethren of the Trinity House as assessors. The functions of the Elder Brethren (or 'Trinity Masters' as they are often called) are, however, solely advisory, to assist the Judge as experts on all matters of nautical practice and skill ; so that witnesses as to such matters are not allowable when the Elder Brethren are present, as they are in actions for collision and salvage as a matter of course. The case is opened without speeches, by calling at once the witnesses for the respective parties ; and, after the evidence is closed, the plaintiff's counsel addresses the Court, and is afterwards entitled to reply to the speech of the defendant's counsel. The Judge, after consulting the Elder Brethren, delivers judgment, in which he may pronounce one or both of the ships to blame, or that the collision was the result of some accident, for which neither is responsible.

The former Admiralty rule as to joint negligence, whereby, when each of two ships was held to blame for damage by collision, the owner of each ship was



liable to bear half the total loss of both ships, has been greatly modified by the Maritime Conventions Act, 1911, ss. 1 and 9 (3); and the existing rule is, that where, by the fault of two or more vessels, damage or loss (whether by collision or not) is caused to one or more of them, or to property on board, each vessel shall be liable in proportion to the degree in which she was in fault. But if it is impossible to establish different degrees of fault, the liability is to be apportioned equally, as under the old rule. Costs are in the discretion of the Judge, with the result that usually the successful party gets the costs of the action; when both ships are found to blame, even though in different proportions of blame, the general rule is that each party is made to bear his own costs. Only the questions of liability are decided by the Judge at the hearing; the damages being assessed in the Admiralty Registry, by the Registrar and two merchants.

An appeal from an Admiralty decision lies to the Court of Appeal, and thence to the House of Lords, in both cases with the aid of the Elder Brethren when required. Before 1875, it lay from the Admiralty Court to the Judicial Committee of the Privy Council.

(b) *Action in rem for salvage*.—In this action, the plaintiffs are usually the owners, master, and crew of the ship which has rendered the salvage services; and the defendants are the owners of the ship to which the services have been rendered, and of her cargo and freight. And the parties are generally so described in the writ. The steps taken to arrest the salvaged property, or to get bail given for the amount of the claim and costs, are the same as those in a collision action *in rem*.

As the amount of salvage remuneration depends largely on the value of the salvaged property, the proceedings to ascertain the value of the latter are

important. The usual practice is for the defendants to file an 'affidavit of values'; and the affidavit is, *primâ facie*, conclusive. If, however, the plaintiffs consider that the values as sworn are too low, they may obtain an order for the *appraisement* of the property, by one or more valuers appointed by the marshal of the court, whose valuation is final and conclusive. The plaintiffs are bound by the defendants' affidavit of values, if an appraisement was possible and they have not required it. If, on the other hand, they have required it, the question of the incidence of the costs of appraisement, which are often heavy, depends on whether the appraised values are substantially higher than those sworn to in the affidavit. Where there are two or more sets of salvors, and they have issued separate writs, the different actions are consolidated, and ordered to be tried together; and the conduct of the consolidated action is usually given to the party who appears to have been the principal salvor.

In a salvage action, the statement of claim sets out particulars of the service rendered, and the nature of the danger or loss from which the defendants' property was thereby saved, and claims such an amount of salvage as may to the Court seem just. In the defence, it may be denied that any services of a salvage nature were rendered; or, while admitting that the services were salvage, it may be contended that the description of them in the statement of claim is exaggerated or untrue. The defendants may also pay money into court by way of tender, with or without a denial of liability, with a view to getting their costs of the action subsequent to the date of the tender, if it is upheld at the trial.

If the amount of salvage awarded by the Court is, together with the plaintiffs' costs of the action, considerably less than the amount of bail demanded by

the plaintiffs, the Judge will condemn them to pay the defendants' costs of providing bail beyond a reasonable amount. It is not the practice to claim a specific sum as salvage ; but if the amount awarded exceeds the amount for which bail has been given, the claim may, by leave of the Judge, be amended, and, for the balance for which bail has not been given, execution may issue ; and the defendants' ship may, like other chattels of the defendants, be seized by the sheriff under a writ of *fiery facias*, notwithstanding its previous arrest and release.

#### NOTE ON AUTHORITIES.

[*Probate Rules (Contentious Business)*, and *Tristram and Coote*, "*Probate Practice*." *Divorce Court Rules*, and *Browne and Watts* on "*Divorce*." *Roscoe*, "*Admiralty Practice*." *Rules of Supreme Court* and notes thereon in the "*Yearly Practice*."] 

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## CHAPTER XXX.

## PROCEEDINGS IN BANKRUPTCY.

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*Bankruptcy Legislation.*—The beginning of the law of bankruptcy (which has no existence apart from statute) in this country is the statute 34 & 35 Hen. VIII. (1542) c. 4, which described bankrupts as those who, “craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own wills and pleasures, consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience.” Since then our bankruptcy laws have undergone many changes of policy and of method, of which a short account will be found in previous editions of this work.

The existing system was in the main introduced by the (now almost wholly repealed) Bankruptcy Act, 1883; and the principal statute on which it now rests is the consolidating Bankruptcy Act, 1914 (which it will be convenient to refer to as ‘the Act’), together with a few unrepealed sections of earlier statutes. Rules have been made under statutory authority.

The bankruptcy system is in part administrative and in part judicial; and the administrative functions involved are subject to the control of the Board of Trade, a comparatively new feature in our bankruptcy



law. The tribunals having jurisdiction in bankruptcy are now the High Court of Justice, to which the jurisdiction of the London Court of Bankruptcy was transferred by the Bankruptcy Act of 1883, and such of the county courts as are not excluded from bankruptcy jurisdiction by order of the Lord Chancellor. The bankruptcy business of the High Court was dealt with by the King's Bench Division until 1921, when it was assigned to the Chancery Division.

Upon every Court having jurisdiction in bankruptcy as now established, there has been conferred a general power of deciding all questions of priorities, and all questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, and which it may be deemed by that Court necessary or expedient to decide, for the purpose of doing complete justice, or of making a complete distribution of the property of the bankrupt.

#### LIABILITY TO BE MADE BANKRUPT.

Any debtor may, *primâ facie*, be made bankrupt ; but there are certain persons whose status either exempts them from the bankruptcy laws, or makes them only amenable *sub modo*.

(i) *Married Women*.—Under the older bankruptcy laws, traders alone could be brought within the jurisdiction ; but now, except in one case, non-traders are equally liable with traders to be made bankrupt. This exception is the case of the married woman, who, though not, as a rule, within the scope of the bankruptcy laws, may, by section 125 of the Act, if she carries on a trade or business, whether separately from her husband or not, be made bankrupt, and is subject to the bankruptcy laws as if she was a feme sole.

(ii) *Infants*.—An infant cannot, in the ordinary way,

even though engaged in trade, be made bankrupt; inasmuch as he cannot bind himself by an ordinary trading contract. Whether he can be made bankrupt in respect of debts for necessities, or for liabilities in torts, seems never to have been decided. He cannot, however, be made bankrupt upon a judgment founded on a bill of exchange given in payment for necessities (*In re Soltykoff* [1891] 1 Q. B. 413). Nor can he be made bankrupt upon a debt contracted by a firm in which he is a partner (*Lovell & Christmas v. Beauchamp* [1904] A. C. 607). (See also, as to the liability of infants on contract, pp. 33–37, and in tort pp. 287–290.)

(iii) *Lunatics*, in special circumstances, may be made bankrupt.

(iv) *Corporations*, and companies registered under the Companies (Consolidation) Act, 1908, are not amenable to the bankruptcy laws. The analogous procedure in the case of the latter is winding-up proceedings (Vol. I., pp. 394–397).

(v) *Partnerships*, including limited partnerships (pp. 247–248), are not *as such* capable of being made bankrupt; but the members of the partnership are liable as individuals to be made bankrupt, special provision being made for keeping distinct accounts of the partnership estate and the separate estates, and for the ranking of creditors against them respectively.

(vi) *Aliens* are subject to the bankruptcy laws, provided that they satisfy the general provisions as to domicile or residence or carrying on business in England.

#### JURISDICTION IN BANKRUPTCY.

Apart from these questions of status, the Act requires that the debtor should be subject to the jurisdiction of the court; and this requirement is explained in two sections of the Act, of which the

combined effect is not very clear. Section 4 (1) provides, that a creditor shall not be allowed to present a bankruptcy petition against a debtor, unless (amongst other matters) the debtor is domiciled in England, or (within a year before the date of the presentation of the petition) has ordinarily resided or had a dwelling-house or place of business in England ; or, except in the case of a person domiciled in Scotland or Ireland, or a firm or partnership having its principal place of business in Scotland or Ireland, he has within the same period carried on business in England personally or by means of an agent or manager, or is or has been a member of a firm or partnership carrying on business in England, by means of a partner or partners or an agent or manager. But, in addition to that provision, section 1 (2) of the Act provides that a 'debtor,' *i.e.*, a person liable to be made bankrupt, "includes any person whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him (*a*) was personally present in England; or (*b*) ordinarily resided or had a place of residence in England; or (*c*) was carrying on business in England, personally, or by means of an agent or manager; or (*d*) was a member of a firm or partnership which carried on business in England."

#### ACTS OF BANKRUPTCY.

Bankruptcy proceedings may be taken either by a creditor or creditors, or by the debtor himself; the first step in each case being the filing of a petition praying for a receiving order. But, in the case of a creditor's petition, it is essential that the debtor shall have committed or suffered, within three months prior to the presentation of the petition, one or more of the following eight *acts of bankruptcy* (s. 1 (1) of the Act), *viz.* : (1) in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees

for the benefit of his creditors generally ; (2) in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof ; (3) in England or elsewhere, made any conveyance or transfer of his property, or any part thereof, or created any charge thereon, which would, under the Act or any other Act, be void as a fraudulent preference if he were adjudged bankrupt ; (4) with intent to defeat or delay his creditors, done any of the following things, viz., departed out of England, or, being out of England, remained out of England, or departed from his dwelling-house, or otherwise absented himself, or begun to keep house ; (5) suffered execution against himself to be levied by seizure of his goods, under process in an action in any court or in any civil proceeding in the High Court, and allowed the goods to be either sold or held by the sheriff for twenty-one days ; (6) filed in the court a declaration admitting his inability to pay his debts, or presented a bankruptcy petition against himself ; (7) being served in England (or, by leave of the Court, elsewhere) with a bankruptcy notice under the Act, requiring him to pay a judgment debt in accordance with the terms of the judgment or order against him, or to secure or compound for it to the satisfaction of the creditor or of the Court, failed—within (usually) seven days after service of the notice—either to comply with the requirements of the notice, or to satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained ; or (8) gave notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts.

Moreover, on an application under the Debtors Act, 1869, made by a judgment creditor for an order of committal against the judgment debtor, the Court



may, with the consent of the creditor, in lieu of committing, make a receiving order against the debtor ; in which event the debtor is deemed to have committed an act of bankruptcy at the time when such order is made (Bankruptcy Act, 1914, s. 107).

#### FRAUDULENT ALIENATIONS OF PROPERTY.

The “fraudulent conveyance, gift, delivery, or “transfer” of property which constitutes the second of the above-named acts of bankruptcy is also important for other purposes. Fraudulent alienations of property are either (i) fraudulent at Common Law or under the provisions of statute 13 Eliz. (1571), c. 5, which are usually treated as being substantially identical with the Common Law, the statute being avowedly declaratory (*Twyne's Case* (1601) 1 Smith's Leading Cases) ; or (ii) fraudulent under bankruptcy legislation.

(i) The statute 15 Eliz. (1571) c. 5 (a temporary statute made perpetual in 1586) makes “utterly “void” against “creditors or others” (though it seems to be mainly concerned to protect creditors) any alienation of property, real or personal, corporeal or incorporeal, made with “intent to delay, hinder, “or defraud creditors or others of their just and “lawful actions” and claims ; with, however, a proviso (s. 5) protecting persons who have taken an interest under such an alienation in good faith and for ‘good’ (which has been construed to mean ‘valuable’) consideration. The question of the necessary intent is one of fact in each case ; but, from time to time, and particularly in *Twyne's Case*, *supra*, the Judges have indicated certain ‘badges of fraud’ which *primâ facie* amount to, or contribute to make up, adequate evidence of fraudulent intent. For instance, the fact that the alienor disposed of the whole of his property by the alienation, or that he “continued in possession

“and used them (his goods and chattels) as his own”; the secrecy of the transaction; the imminence of proceedings against him; the existence of a trust between alienor and alienee, “for trust is the cover “of fraud”; or (on the principle that *qui s’excuse, s’accuse*) the existence in the deed or other document (if the transaction is in writing) of professions of good faith or other unusual and suspicious clauses—these are all “badges of fraud.” There must have been (it seems) “actually existing, or in immediate contemplation, at the date of the (alienation), creditors “capable of being injured by it”; but, this condition being satisfied, any creditor, or the alienor’s trustee in bankruptcy, may take steps to impeach the alienation recover the property, and all the creditors will then participate in the fund thus recovered.

An opportunity may be taken here to mention another Elizabethan statute against fraudulent conveyances of any interest *in land*, viz., the 27 Eliz. (1584), c. 4. This statute, which is confined to alienations of an interest in land, and aims at the protection of disappointed purchasers rather than of creditors, makes ‘utterly void’ as against subsequent purchasers, any conveyance or other alienation of land (except one in favour of a *bonâ fide* purchaser for value) made with intent to defraud subsequent purchasers, who might (but for the statute) find that they had paid their money and got in exchange a parcel of title-deeds and no more. Conveyances reserving to the alienor a power of revocation, determination, or alienation, are also made void as against subsequent purchasers. Judicial glosses, however, widened the scope of this statute; and it was held in course of time that *every* voluntary conveyance of land was liable to be avoided by a subsequent purchaser for value from the donor, even though that purchaser had at the time of his purchase notice of

the existence of the previous voluntary conveyance. This interpretation was considered to place voluntary conveyances of land in too great danger, and, accordingly, upon the introduction of Lord Macnaghten, the Voluntary Conveyances Act, 1893, was passed, which provided that no voluntary conveyance, made either before or after the passing of that Act, "if in fact made *bonâ fide* and without fraudulent intent," should be deemed fraudulent under the statute 27 Eliz. (1584) c. 4, by reason of any subsequent purchase for value, or be defeated thereunder.

(ii) An act of bankruptcy is also constituted by the making of an alienation of property which, although not fraudulent within the statute 15 Eliz. (1571) c. 5, or conveniently capable of being dealt with under that statute, is fraudulent under the bankruptcy legislation; as for instance an alienation which substantially conveys the debtor's whole property in consideration of a pre-existing debt, or (probably) one which conveys even a portion of his property in consideration of such a debt, if made voluntarily and in contemplation of bankruptcy, or if it otherwise has the effect of defeating or delaying the creditors.

#### PRESENTATION OF CREDITOR'S PETITION.

Such being the different acts of bankruptcy, one of which must have been committed before a petition can be filed by a creditor, we may next notice (i) that there must be a debt owing to the petitioning creditor amounting to £50 or upwards; but any two or more creditors whose debts in the aggregate amount to £50 may be the petitioning creditor; (ii) that the debt must be a liquidated sum, and payable either immediately or at some certain future time; (iii) that it must be an actionable debt, *e.g.*, not statute-barred or founded upon an illegal consideration; (iv) that

the relevant act of bankruptcy on which the petition is grounded must have occurred within three months of its presentation ; (v) that the debtor must satisfy the requirement as to domicile or residence or carrying on business already set out (p. 631).

If the debt of the petitioner should be a secured debt, then the creditor must, in his petition, state that he is willing to give up his security for the benefit of the creditors in the event of an adjudication of bankruptcy ; or else he must give an estimate of the value of the security, and then he is deemed to be a petitioning creditor in respect only of the balance of his debt above the value of the security.

The petition, which must be verified by affidavit, is to be filed either in a county court having bankruptcy jurisdiction (which in that case has, for this purpose, all the jurisdiction of the High Court) or in the High Court, according to the locality in which the debtor has been residing or carrying on business during the preceding six months.

A creditor's petition must be duly served on the debtor ; and, in order to prevent his avoiding such service, the debtor may, in a proper case, be arrested as an absconding debtor (s. 23 of the Act).

#### DEBTOR'S PETITION.

A debtor's petition must allege that the debtor is unable to pay his debts ; and the presentation thereof is to be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court must thereupon make a receiving order. A debtor's petition cannot after presentment be withdrawn, without the leave of the Court.



## RECEIVING ORDER.

The next stage in the proceedings is the making of the receiving order upon the hearing of the petition (though at any time after the presentation of the petition, the Court may make an *interim* appointment of an official receiver as receiver of the debtor's property, and may stay any pending action or execution or other legal process). Upon the hearing of the petition, the creditor proves his debt, which is not necessarily a judgment debt, and of which, even when it is a judgment debt, underlying consideration is in a proper case examinable by the Court. If not satisfied upon the proof of the debt and upon other essential points, the Court may dismiss the petition ; but, unless it is dismissed, a receiving order will be made, and an official receiver will be thereby constituted receiver of the property of the debtor. After such order, no creditor having a provable debt may commence an action or other proceeding unless with the leave of the Court. The official receivers are officers of the Board of Trade, and also officers of the Court to which they are attached. Their duties will sufficiently appear from the following pages.

## DEBTOR'S STATEMENT OF AFFAIRS.

Within seven days from the date of the receiving order (if it is on a creditor's petition), and within three days from that date (if the petition is that of the debtor himself), the debtor makes out and submits to the official receiver a statement of his affairs, showing the particulars of his assets and liabilities.

Within four days of submitting his statement of affairs, the debtor has an opportunity of lodging with the official receiver a written proposal for a *composition* or *scheme of arrangement* ; and thus perhaps he may be

able to avert an adjudication of bankruptcy by inducing his creditors to accept his proposal as an alternative. The rules governing compositions and deeds of arrangement are dealt with later (pp. 660-664).

### PUBLIC EXAMINATION.

As soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs, the Court holds a public sitting (the date of which is duly advertised) for the examination of the debtor (s. 15 of the Act). This *public examination* of the debtor is based upon the statement of his affairs; and the official receiver, the trustee (if appointed), and the Court, may put questions to the debtor, as likewise may any creditor who has tendered a proof of his debt. It is the duty of the debtor to answer all such questions. The debtor is of course bound, on the day appointed for his public examination, and on any adjournment of such examination, to attend the Court; and, a note of his examination having been taken down in writing, such note is read over to or by, and signed by, the debtor, and is afterwards open to the inspection of any of his creditors, and may be used in evidence against him except in any proceedings against him for misdemeanor under the Larceny Act, 1916, s. 20, which relates to frauds by agents, bankers, and solicitors. When the Court is satisfied that the affairs of the debtor have been sufficiently investigated, but not until after the day appointed for the first meeting of creditors, it makes an order declaring that the public examination is concluded.

The bankrupt, besides submitting his statement of affairs, and besides attending on his public examination and on any adjournment thereof, is required to attend the meetings of his creditors; to wait on the official

receiver or trustee ; to execute necessary powers and instruments ; to furnish an inventory of his property ; and, generally, to do everything in relation to his property and the distribution of its proceeds amongst his creditors, which may reasonably be required by the trustee, or which may be ordered by the Court (s. 22).

The Court may, on the application of the official receiver or of the trustee, after the receiving order has been made, summon before it, and if necessary apprehend, the bankrupt, or his wife, or any other person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to him, or thought capable of giving information as to him, his dealings or property, and examine such persons on oath (s. 25).

### FIRST MEETING OF CREDITORS.

As soon as conveniently possible after the receiving order has been made and advertised, the official receiver summons by advertisement a general meeting (usually called the 'first meeting') of the creditors, and sends to each of the creditors mentioned in the debtor's statement of affairs a summary of that statement.

At this meeting, usually presided over by the official receiver (or his nominee) in whom the property vests from the date of the adjudication until the appointment of some other trustee, the creditors consider whether the debtor shall be made a bankrupt or not, or whether, supposing any composition be offered by the debtor, it shall be accepted or not—a subject which will be dealt with later (pp. 660–664). If they, at such first meeting, or at any adjournment thereof, by ordinary resolution, resolve that the debtor be adjudged bankrupt—or if they pass no

resolution, or do not even meet—the Court adjudges the debtor a bankrupt; and thereupon the property of the bankrupt becomes divisible among his creditors, and for that purpose vests in a trustee. A debtor may also be adjudicated a bankrupt, either (1) for failing without reasonable excuse to submit to the official receiver his statement of affairs hereinbefore mentioned; or (2) for default in the payment of any instalment due in pursuance of any composition or scheme of arrangement arrived at as hereinafter mentioned; or (3) for absconding; and in the other cases mentioned in the Act. An adjudication order is advertised in the *London Gazette* and in the local papers.

#### APPOINTMENT OF TRUSTEE AND COMMITTEE OF INSPECTION.

Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, they may appoint some fit person (whether a creditor or not) to fill the office of trustee of the bankrupt's property (s. 19); and they may appoint from among the creditors fit persons, not more than five nor less than three in number, to form a 'committee of inspection,' for the purpose of superintending the administration of the bankrupt's property by the trustee.

Every creditor is required to prove his debt as soon as may be after the making of the receiving order, by affidavit; and no person is entitled to vote as a creditor, either at the first or at any subsequent meeting, unless he has first duly proved his debt in the prescribed manner.

The trustee has to give security to the satisfaction of the Board of Trade; and his appointment only becomes effective upon, and as from the date of, the certificate of the Board of Trade, which is conclusive



evidence of his appointment. The property of the bankrupt thereupon passes out of the official receiver and vests in the trustee; but the trustee remains subject to the control of the Board, which is rendered effective by strict provisions requiring the trustee to furnish periodical accounts, and statements of proceedings, and to pay all sums received by him on account of the estate, and not required for current purposes, immediately into the Bank of England, or, in certain cases, a local bank, on pain of removal by the Board of Trade. The trustee may also be removed by the creditors by resolution, and, by the Board of Trade, for misconduct or failure to perform his duties, or for incapacity due to lunacy, ill-health, or absence, or on the ground that his connection with or relation to the bankrupt or a creditor might make it difficult for him to act with impartiality, or in cases where in any other matter he has been removed from office for misconduct, or if the Board is of opinion that the trusteeship is being needlessly protracted without any probable advantage to the creditors.

The duty of the creditors' trustee is, generally, to exercise his best discretion in the management of the estate until the bankruptcy is closed, and until he has obtained his release. Until that event, the trustee may from time to time summon general meetings of the creditors, for the purpose of ascertaining their wishes. He may also from time to time apply to the Court for directions, in relation to any particular matter arising in the bankruptcy. And, as the bankruptcy proceeds, he consults with the committee of inspection as to his proceedings.

#### POWERS OF THE TRUSTEE.

With a view to the full and due realisation by the trustee of the assets of the bankrupt, authority is

specifically given to him by the Act to exercise certain powers ; either on his own authority or with the sanction of the committee of inspection. Thus, he is empowered, of his own authority (s. 55), (1) to sell all or any part of the property of the bankrupt ; (2) to give effectual receipts for any money received by him ; (3) to prove, rank, claim, and draw a dividend in respect of, any debt due to the bankrupt ; (4) to exercise any powers vested in the trustee under the Act, and to execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of the Act ; (5) to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with it, including the power to execute disentailing assurances under the Fines and Recoveries Act, 1833 (Vol. II., Chap. XXI.).

Moreover, with the sanction of the committee of inspection, the trustee may (s. 56) (1) carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ; (2) bring, institute, or defend any legal proceeding relating to the property of the bankrupt ; (3) employ a solicitor or other agent ; (4) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time ; (5) mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts ; (6) refer any dispute to arbitration, and compromise all debts and liabilities owed or incurred to the bankrupt ; (7) make compromises or other arrangements with creditors of the debtor ; (8) make compromises or other arrangements with respect to any claim arising out of or incidental to the property of the bankrupt ; (9) divide in its existing form among the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances,

cannot be readily or advantageously sold ; (10) employ the bankrupt himself to superintend the management of his property ; and (11) make an allowance to him for his support, or in consideration of his services, if he is engaged in winding up his estate.

#### WHAT PROPERTY VESTS IN THE TRUSTEE.

Upon the debtor being adjudicated bankrupt, the property of the bankrupt vests immediately, as we have said, in the official receiver, until a trustee is appointed. By force of his appointment, and subject to the exceptions which will presently be mentioned, the trustee takes, for the benefit of the creditors, all such property, real or personal, as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or which (with the exceptions about to be noticed) may be acquired by or devolve on him before his discharge ; and also all powers which he is entitled to exercise for his own benefit, except the right of nomination to any vacant ecclesiastical benefice.

#### REPUTED OWNERSHIP CLAUSE.

Moreover, in certain cases, the property even of strangers, if found in the bankrupt's possession, vests in the trustee. For, in order to protect creditors from fraud and fallacious appearances, it has been provided (s. 38) that where a bankrupt shall, at the commencement of the bankruptcy, have in his possession, order, or disposition, in his trade or business, by consent and permission of the true owner, any goods, under such circumstances that he (the bankrupt) is the reputed owner thereof, the goods shall be deemed to form part of the property of the bankrupt divisible amongst his creditors ; choses in action, other than trade or business debts, being, however,

expressly excluded from this order and disposition clause. Goods and chattels comprised in a mortgage deed (*e.g.*, a duly registered bill of sale), in the order and disposition of the debtor, are not protected by the mortgage, and will pass to the trustee in such circumstances that the bankrupt is the reputed owner of them (*Hollinshead v. Egan* [1913] A. C. 564); but a well-established custom in a particular trade may negative the reputation of ownership which naturally arises from the possession of goods, *e.g.*, the custom of hotel-keepers hiring furniture.

On the other hand, there does not pass to the trustee any sums which the bankrupt may earn purely by his personal labour or services, after the bankruptcy has commenced (*Affleck v. Hammond*) [1912] 3 K. B. 162, nor any property held by the bankrupt in the capacity of trustee for others (s. 38), nor the bankrupt's tools of his trade and the necessary wearing apparel and bedding of himself and his family up to a total value (inclusive of tools, apparel, and bedding) of £20 (s. 38). The bankrupt's right to sue for damages for breach of contract passes to his trustee; unless the breach is of a purely personal contract which concerns the feelings of the bankrupt, such as a contract to cure or to marry. Where a contract for personal services is broken before bankruptcy, the right of action passes to the trustee; but where the breach occurs during the bankruptcy, the bankrupt is entitled to sue in respect of it, even though the contract was made before his bankruptcy (*Bailey v. Thurston* [1903] 1 K. B. 137). Where the bankrupt has a right of action in tort, his right of action passes to the trustee if, or so far as, the tort has caused damage to the real or personal property of the bankrupt, but remains in the bankrupt if, or so far as, the tort consists of an injury to his person or his reputation, such as assault, false imprisonment,



libel, slander, or seduction (*Rose v. Buckett* [1901] 2 K. B. 449).

The right to receive military or other pay from the Crown does not *ipso facto* pass to the trustee; but nevertheless the Court may, with the sanction of the chief officer of the department to which the bankrupt belongs or belonged, order portions of such pay to be applied in payment of his debts (s. 51); and, subject to due provision for the carrying on of parochial duty, the benefice of a bankrupt clergyman may be sequestrated by his trustee for the payment of his debts (s. 50). And in general, whenever the bankrupt is in receipt of any salary or income, although earned by personal services, the trustee may intervene, and obtain an order for payment of such salary or income to the trustee; except so much thereof as is necessary for the support of the bankrupt and his family. But it seems that the income, if not a salary, must be in the nature of a salary or pension; at any rate, the prospective earnings of a professional man dependent on his own skill or knowledge, and the wages of a miner, were held to be outside this provision and not liable to the intervention of the trustee (*Re Jones* [1891] 2 Q. B. 231).

Even as regards other personal property (including leaseholds) and (since the Bankruptcy Act, 1913) real property acquired by the bankrupt after the adjudication and before he obtains his discharge, the trustee has not a complete title, until he intervenes and claims such property; and, therefore, all transactions with regard to such after-acquired property between the bankrupt and a *bonâ fide* purchaser for value, if carried out before such intervention, are binding as against the trustee (s. 47 of the Act of 1914, which gives statutory effect to the rule in *Cohen v. Mitchell* (1890) 26 Q. B. D. 262, and re-enacts the extension of that rule by the Act of 1913 to real property).

## MARRIED WOMAN'S RESTRAINT UPON ANTICIPATION.

Where a married woman who has been adjudged bankrupt has separate property, the income of which is subject to a restraint on anticipation (Vol. I., pp. 433-434), the Court has power to appropriate the whole or some part of such income for distribution among the creditors ; but regard must be had to the means of subsistence available for the woman and her children (s. 52). It will be observed that this section gives the Court no power to render the capital available for the creditors.

## DISCLAIMER BY TRUSTEE OF ONEROUS PROPERTY.

When any property of the bankrupt consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, the trustee may, at any time within twelve months from the date of his appointment as trustee, or within twelve months after he has become aware of it, if it does not come to his knowledge within one month of his appointment, and provided he shall not have omitted for twenty-eight days to reply to any due written inquiry made to him asking whether he intends to disclaim or not, by writing under his hand, *disclaim* such property (s. 54) ; but in the case of leases, not without the leave of the Court, except in the case of certain small bankruptcies. And such disclaimer, as from the date thereof, operates to determine the rights, interests, and liabilities of the bankrupt and of his property, in or in respect of the property disclaimed, and also discharges the trustee of all personal liability in respect of the property disclaimed, as from the date when the property vested in him (s. 54 (2)).

It is sometimes very difficult to decide what effect a disclaimer of this kind has upon the rights of strangers ; but the Act provides, generally, that any person injured by the operation of this enactment, shall be deemed a creditor of the bankrupt to the extent of such injury, and may prove the same as a debt (s. 54 (8)). And, in particular, that, as regards disclaimers of the leases of the bankrupt, the Court may make an order for the vesting of such leases in any one appearing to the Court to be interested therein—*e.g.*, an under-lessee of the bankrupt, or his mortgagee (whether by demise or by assignment)—provided that such under-lessee or mortgagee will assent to undertake the liabilities incident to the lease, that is to say, such of them as would have attached to any absolute assignee of the lease under an express assignment thereof (s. 54 (6)).

#### DOCTRINE OF RELATION BACK.

The appointment of the trustee of a bankrupt has a retrospective relation. This, indeed, has been the principle of the bankruptcy law ever since the time of Queen Elizabeth ; and it prevailed, at that period, with an austerity which put wholly out of sight the consideration due to innocent parties, and the safety of commercial transactions. Under the Bankruptcy Act, 1869, however, its harshness was considerably mitigated ; protection having been extended by that Act to various *bonâ fide* transactions of the debtor, although they fell within the period covered by the relation back of the trustee's appointment. And now, by section 37 of the Act of 1914, re-enacting earlier provisions, it has been provided, that the bankruptcy of any debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which the receiving order is made against him ; or, if the bankrupt is proved to have

committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. And, where the adjudication follows upon a receiving order made in lieu of a committal order under section 107 of the Act, the bankruptcy relates back to, and commences at, the time of such order, or (if the debtor has committed any previous act of bankruptcy) the time of the first of such acts within three months next preceding the date of the receiving order.

But this rule of 'relation back' is mitigated by the following provisions :—

(a) Section 45 of the Act declares valid (1) any payment by the bankrupt to any of his creditors ; (2) any payment or delivery to the bankrupt ; (3) any conveyance or assignment by the bankrupt for valuable consideration ; (4) any contract, dealing, or transaction by or with the bankrupt for valuable consideration ; provided that in all these cases the transaction took place before the receiving order, and the other party to it had no notice of *any* available act of bankruptcy.

(b) Section 46 of the Act provides, that a payment of money or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him, shall, notwithstanding anything in the Act, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made, and (except in cases where the receiving order is made in lieu of a committal order, under section 107 of the Act) without notice of the presentation of the bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bonâ fide*.



(c) Section 40 of the Act provides, that executions against the bankrupt, whether by *feri facias* against his goods, or by *elegit* against his lands, or by garnishee order, in general hold good, if perfected before the date of the receiving order, and before notice of the presentation of any petition by or against the debtor, or of the commission of an available act of bankruptcy by him. For this purpose an execution against goods is perfected by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an interest which cannot be seized by legal execution, by the appointment of a receiver. But this provision is subject, as regards execution against goods under a judgment for more than twenty pounds, to the provision hereinafter mentioned (p. 650).

#### AVOIDANCE OF TRANSACTIONS.

There are cases, however, in which transactions are void as against the trustee, even independently of the doctrine of relation back.

(i) *Fraudulent alienations*.—As regards fraudulent conveyances, the trustee's title will prevail against all dispositions of property, under colour either of alienation or of legal execution, which are not *bonâ fide*, but of a merely feigned or collusive character (pp. 633–634); whether a prior act of bankruptcy has been committed or not.

(ii) *Fraudulent preferences*.—It will prevail against all alienations and payments voluntarily (that is to say, without pressure) made by the debtor shortly before his bankruptcy, with the intention of giving a preference to some particular creditor or creditors. For a transaction of this kind evidently tends to defeat the main principle of the bankruptcy law; and accordingly section 44 of the Act provides that “every

“conveyance or transfer of property, or charge thereon  
“made, every payment made, every obligation  
“incurred, and every judicial proceeding taken or  
“suffered by a person unable to pay his debts as they  
“become due from his own money, in favour of any  
“creditor, or of any trustee for such creditor, with a  
“view to giving such creditor, or any surety or  
“guarantor for the debt due to such creditor, a  
“preference over the other creditors,” shall, if the insolvent become bankrupt on a petition presented within three months afterwards, be deemed fraudulent and void as against the trustee. But this section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. To constitute a fraudulent preference, it is essential that the benefit should have been conferred upon the creditor by the debtor voluntarily, and with an intention to give him a preference, and not under genuine and spontaneous pressure from the creditor (*Sharp v. Jackson* [1899] A. C. 419). A fraudulent preference is, as we have already seen (p. 632), an act of bankruptcy.

(iii) *Executions*.—As regards executions, section 41 of the Act provides (1) that where goods are taken in execution, and, before the sale thereof or completion of the execution (as therein defined), notice of the receiving order is served on the sheriff, he must on request deliver the goods, and any money seized or received in part satisfaction of the judgment, to the official receiver ; and (2) that where, under an execution in respect of a judgment for a sum above twenty pounds, the goods are sold, or money is paid in order to avoid a sale, the trustee, if notice of the bankruptcy petition has been served on the sheriff within fourteen days of such sale or payment, shall be entitled to the proceeds of sale or money paid, less the sheriff's expenses. But a purchaser in good faith from the

sheriff acquires a good title as against the trustee in bankruptcy.

(iv) *Voluntary settlements*.—As regards voluntary settlements, it is provided by section 42 of the Act that every ‘settlement of property’ (including every such conveyance or transfer (written or oral) as contemplates the retention of the property by the donee either in its original form or in such form that it can be traced, for instance, a gift of diamonds to a wife (*In re Vansittart* [1893] 1 Q. B. 181)), made by a debtor (not being an ordinary antenuptial settlement or made in favour of a purchaser or incumbrancer, *bonâ fide* and for valuable consideration, or a post-nuptial settlement on wife or children of property accruing after marriage in right of the settlor’s wife), shall, if the settlor become bankrupt within *two years* after its date, be ‘void’ as against his trustee; and shall, if he become bankrupt within *ten years*, be ‘void’ against the trustee, unless the parties claiming under the settlement can prove that, at the time it was made, the settlor was solvent without the aid of the property settled, and that the interest of the settlor passed to the trustees of the settlement, or the beneficiaries, upon its execution. But it has been decided that ‘void’ in this section means ‘voidable,’ ‘liable to be avoided’; and so a *bonâ fide* purchaser for value of the property settled, from the donee under the settlement, gets a good title against the trustee in bankruptcy, even if the purchase takes place after the commission by the bankrupt of an act of bankruptcy, and therefore after the accrual of the trustee’s title, provided that the purchaser had not notice of the commission of the act of bankruptcy (*Re Hart* [1912] 3 K. B. 6).

The same section (42) also contains provisions for the avoidance, in certain events, of covenants in marriage settlements to settle after-acquired property

wherein the settlor had no interest at the time of the marriage, and of payments of money and transfers of property in pursuance of such covenants.

(v) *General assignments of book debts*, present or future, made by any person engaged in any trade or business who is subsequently adjudicated bankrupt, are, by s. 43 of the Act, void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy; unless the assignment has been registered as if it were a bill of sale given otherwise than by way of security under the Bills of Sale Act, 1878.

#### DISTRIBUTION OF BANKRUPT'S PROPERTY.

One of the chief duties of a trustee in bankruptcy consists in declaring and distributing, from time to time and with all convenient speed, dividends amongst the creditors who have proved their debts; the first dividend being declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date, and subsequent dividends being, in the absence of sufficient reason to the contrary, declared and distributed at intervals of not more than six months (s. 62). When the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, it is his duty to declare a final dividend, after giving notice, in the prescribed manner, to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the Court within a certain time, he will proceed to make a final



dividend without regard to their claims (s. 67). Any surplus remaining after paying the creditors in full, with interest, and the costs of the proceedings, goes to the bankrupt.

### RANKING OF CREDITORS.

Dividends are, in the main, paid rateably among all the creditors, according to the *quantity* of their debts, no regard being in general had to the *quality* of them ; but by miscellaneous statutory enactments (some of which will be mentioned) there are some creditors who have a priority, and some whose claims are deferred. Judgments and recognisances, and other debts by record or specialty, are all put on a level with debts by mere simple contract ; voluntary covenants and bonds are not postponed to debts incurred for value ; and equitable debts are on the same footing as legal debts.

*Secured creditors.*—A creditor who has a specific security on the property of the bankrupt (such as a mortgage or pledge) is entitled, notwithstanding the bankruptcy, either (i) to give up his security and prove for his whole debt, or else (ii) to realise his security and prove for any balance, or (iii) to give credit for its value and to prove and receive a dividend *pari passu* with the other creditors in respect of any balance remaining unpaid.

*Distraining landlord.*—A landlord may, either before or after the commencement of the bankruptcy, distrain for rent on the bankrupt's goods ; but if the distress is levied after the commencement of the bankruptcy, it is only available for six months' rent accrued due prior to the date of the order of adjudication. For the remainder the landlord must come in *pari passu* with the rest of the creditors (see also p. 414).

*Other preferred creditors.*—Priority is also given (and to some extent even as against the landlord's preferential right of distress) to claims for compensation under the Workmen's Compensation Act, 1906, to the extent of £100 in the case of each workman (p. 307) ; to contributions due from the employer under the National Health Insurance Acts, 1911 to 1920, and under the Unemployment Insurance Act, 1920 ; to one year's rates and taxes, to the wages or salaries of the debtor's clerks or servants, not exceeding fifty pounds each, due in respect of services rendered during the four months before the date of the receiving order, and also to the wages of any labourer or workman, not exceeding £25, due in respect of services rendered during the two months immediately before the date of the receiving order. All these last mentioned classes of debts are to be paid in full, if the property of the bankrupt is sufficient, in priority to all others, but are to abate *inter se* if the property of the bankrupt is insufficient for their payment (s. 33).

*Deferred creditors.*—There are certain claims which are only to be paid after all other debts for value have been satisfied in full, namely, that of the lender of money, or of the vendor of goodwill to a person engaged in business (Partnership Act, 1890, s. 3) ; a claim for money lent by a wife to her husband or by a husband to his wife to be employed in trade or business (Bankruptcy Act, 1914, s. 36) ; and claims of persons entitled under certain covenants in a marriage settlement by the bankrupt to settle after-acquired property (s. 42 (21)). With these principal exceptions, all debts provable in the bankruptcy are payable *pari passu*.

#### WHAT DEBTS ARE PROVABLE.

Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise,

or breach of trust, are not provable in the bankruptcy ; and no person having notice of any act of bankruptcy available against the bankrupt can prove for any debt or liability contracted by the bankrupt subsequently to the date of such notice having been received. With these exceptions, however, all debts and liabilities (a term which is very extensively defined in s. 30 (8) of the Act), present or future, certain or contingent, to which the bankrupt is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred previously to such date, may be proved ; uncertain or contingent debts and liabilities being for this purpose estimated by the trustee, subject to an appeal to the Court. But if in the opinion of the Court the value is incapable of being fairly estimated, the debt or liability will be deemed to be one not provable in bankruptcy (s. 30). The position, therefore, of claims in tort against the bankrupt is as follows. Unless by the time of the receiving order the damages claimed have become liquidated, either by a judgment or under an award, or even (in certain circumstances) by agreement, they are not provable in the bankruptcy. On the other hand, the bankrupt is not released, upon obtaining his discharge, from unprovable claims in tort, because (s. 28 of the Act) his discharge only releases him from claims which are provable in the bankruptcy (with the exceptions specified in that section).

#### THE BANKRUPT'S DISCHARGE.

In due course the bankrupt may hope to obtain his discharge ; and he may, at any time after being adjudged bankrupt, apply to the Court for an order accordingly (s. 26). This application will be heard in open court as soon as conveniently can be after the public examination is concluded, but not before ; and.

upon the hearing of the application, the Court may grant the bankrupt an absolute order of discharge, the effect of which will be to release him from all debts provable in bankruptcy, with the following exceptions (s. 28):—

- (i) any debt on a recognisance ;
- (ii) certain kinds of debts to the Crown, or a sheriff or other public officer ;
- (iii) any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party ;
- (iv) any debt or liability whereof he has obtained forbearance by any fraud to which he was a party ;
- (v) any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as co-respondent in a matrimonial cause ; except to such an extent and under such conditions as the Court expressly orders in respect of such liability.

A bankrupt, duly discharged, is moreover entitled, when the discharge is absolute and unconditional, to enjoy, free from the claims of his former creditors, other than those before mentioned as continuing, all future acquisitions of property. So that, in the language often applied to the case of a discharge under former statutes, “ he becomes a clear man again,” subject only to continuing to give to the trustee such assistance as may be required for the realisation and distribution of his former property ; failing which his discharge may be revoked. But, of course, the bankrupt’s discharge does not free from liability any surety for, or co-surety or co-contractor of, the bankrupt, or any partner of the bankrupt ; though, on the other hand, the bankrupt cannot, by promise given without a new and valuable consideration or



(presumably) under seal, revive a debt from which he has been duly released by discharge.

#### WHEN THE DISCHARGE WILL BE SUSPENDED OR REFUSED.

But the bankrupt is not, as a matter of course, entitled to the absolute and unconditional order of discharge above referred to. For the Court takes into consideration the report of the official receiver as to the bankrupt's conduct and affairs, including a report as to his conduct during the bankruptcy proceedings. And the Court *may* refuse the absolute order of discharge, or suspend the operation of such an order for a specified time, or grant the order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. And the Court *must* refuse the order of discharge in all cases where the bankrupt has committed any misdemeanor under the Act, or any other misdemeanor or felony connected with his bankruptcy. And further, the Court *must*, upon proof of any one or more of the facts about to be mentioned, either (i) refuse the order, or (ii) at least suspend the operation of it for a period of not less than two years, or (iii) suspend it until a dividend of not less than ten shillings in the pound has been paid to the creditors, or (iv) require the bankrupt, as a condition of his discharge, to consent to judgment being entered up against him for any unsatisfied balance of the debts provable, such judgment to be satisfied out of his future earnings and after-acquired property. The facts, proof of any of which compels the Court to adopt one of these alternative courses, are, (1) that the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies

the Court that this fact has arisen from circumstances for which he cannot justly be held responsible. But, when this fact is the only one proved, the period of suspension of the discharge may be less than two years ; (2) omission to keep proper books of account within the three years immediately preceding his bankruptcy ; (3) continuing to trade after knowing himself to be insolvent ; (4) contracting any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it ; (5) failure to account satisfactorily for any loss or deficiency of assets ; (6) bankruptcy caused by rash and hazardous speculations or unjustifiable extravagance in living, or by gambling, or by culpable neglect of business affairs ; (7) frivolous or vexatious defences to actions properly brought against him by creditors ; (8) incurring unjustifiable expense by bringing a frivolous or vexatious action ; (9) recently giving of an undue preference to any of his creditors ; (10) recently incurring liabilities with a view of making his assets equal to ten shillings in the pound ; (11) previous bankruptcy or composition or arrangement with creditors ; (12) commission of any fraud or fraudulent breach of trust ; and (13) the execution of a fraudulent or unjustifiable marriage settlement. (Many of these acts and omissions only affect the discretion of the Court upon an application for discharge when they take place within a certain period preceding the bankruptcy ; but for the details the student must refer to the Act (s. 26) (3).)

#### DISQUALIFICATIONS OF BANKRUPT.

An adjudication of bankruptcy has the effect of disqualifying the bankrupt from sitting or voting in the House of Lords, or being elected to, or sitting or

voting in the House of Commons, and from holding various public offices, including membership of a county or borough council or being a Justice of the Peace. Such disqualification continues for five years after the bankrupt has received his discharge, unless it is cancelled by the annulment of the bankruptcy, or by obtaining from the Court with the discharge a certificate to the effect that the bankruptcy was caused by misfortune, without misconduct on the part of the bankrupt (Bankruptcy Disqualification Act, 1871; Bankruptcy Act, 1883, ss. 32-34; Act of 1890, s. 9).

#### BANKRUPTCY OFFENCES.

Part VII. of the Act (ss. 154-166) provides for the punishment of a bankrupt, or person in respect of whose estate a receiving order has been made, who is guilty of a *misdemeanor* as therein defined. The offences specified in these sections may be summarised as follows:—(1) failure to discover, or (2) to deliver, property to the trustee, or (3) to deliver books and writings to the trustee; (4) concealment, or (5) fraudulent removal, of property; (6) material omission in statement of affairs; (7) failure to inform trustee of a false claim by an alleged creditor; (8) preventing the production of relevant books and writings, or (9) being party or privy to their destruction or mutilation, or (10) making false entries in them; (11) fraudulently parting with or altering documents; (12) alleging fictitious losses or expenses; (13) obtaining property by credit by pretending to be carrying on a business or by any other fraud; (14) pawning property obtained on credit; (15) obtaining by fraud the consent of creditors to an agreement connected with the bankruptcy; (16) in the case of an undischarged bankrupt, obtaining credit to the extent of £10

without disclosing the fact that he is an undischarged bankrupt, or carrying on any trade or business under a fresh name without disclosing the name under which he was adjudicated bankrupt ; (17) frauds and false pretences of various kinds ; (18) causing or aggravating his insolvency by gambling or rash and hazardous speculations ; (18) failure to account satisfactorily for losses of property ; (19) failure by a person previously made bankrupt to keep proper books of account ; (20) absconding with property with intent to defraud (which, however, is felony).

A person who is guilty of any of the foregoing offences (some of which are only criminal if committed within a certain period before or after the presentation of a bankruptcy petition) is liable to imprisonment for any term not exceeding two years, if convicted on indictment, or six months on summary conviction, in either case with or without hard labour ; but in the case of (20) above (s. 156 of the Act) one year's imprisonment is the maximum on conviction on indictment.

#### COMPOSITIONS AND DEEDS OF ARRANGEMENT.

It has always been considered within the true spirit of our modern bankruptcy laws to enable a debtor and his creditors to carry into effect any amicable arrangements between them. Such arrangements are of three main types : a composition or scheme of arrangement sanctioned by the Court either (i) before, and in lieu of, or (ii) after adjudication ; and (iii) a deed of arrangement apart from bankruptcy proceedings.

(i) *Composition or scheme before adjudication.*—In this case, which is governed by ss. 16–17 of the Bankruptcy Act 1914, the debtor lodges his proposal with the official receiver within four days of submitting his statement



of affairs. But the scheme is not binding on the creditors, unless it is carried by a resolution passed by a majority in number, representing three-fourths in value, of all the creditors who have proved, and thereupon approved by the Court; the application for that purpose being made either by the official receiver or the trustee, or by the debtor. The application is not to be heard until after the public examination is concluded.

The Court is required, before approving a composition or scheme, to hear a report of the official receiver or the trustee as to its terms, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor; and no composition or scheme is to be approved which does not provide for the payment, in priority to other debts, of all debts entitled to priority in the case of bankruptcy (p. 654). If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court would be *required* under the Act, in the event of bankruptcy (pp. 657–658), to refuse the debtor's discharge, the Court *must* refuse to approve the composition or scheme. Also, if any such facts are proved as would under the Act justify the Court in refusing, qualifying, or suspending the debtor's discharge in the event of bankruptcy (p. 657), the Court *must*, unless reasonable security is given for the payment of five shillings in the pound on the unsecured debts, refuse to approve the composition or scheme. And in all other cases, the Court *may*, in its discretion, refuse to approve the composition or scheme. Speaking generally, the trustee under a composition or scheme has the same powers and performs the same duties as a trustee in bankruptcy; the property of the debtor is distributed in the same manner; and, *mutatis mutandis*,

the bankruptcy law, so far as the nature of the case admits, applies (s. 16, sub-ss. 17, 18).

If duly accepted by the creditors and approved by the Court, the composition or scheme is binding on all the creditors, so far as relates to any debts due to them from the debtor, and provable in bankruptcy. But (as in the case of bankruptcy) it does not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause; except as may be ordered by the Court. The aid of the Court is available for enforcing the provisions of a composition; and, in the event of default under it by the debtor, or if, for any other reason, the composition is not working well, the Court may annul it, and adjudicate the debtor bankrupt.

(ii) *Composition or scheme after adjudication*.—By s. 21 of the Bankruptcy Act, 1914, the creditors may, after an adjudication, accept, and thereupon the Court may approve, a composition or a scheme of arrangement of the debtor's affairs; in which event the Court may in its discretion annul the bankruptcy. The proceedings are, speaking generally, the same as in the case of a composition before adjudication.

(iii) *Deed of arrangement*.—The statutory composition or scheme accepted and approved under the provisions of the Bankruptcy Acts is to be distinguished from a debtor's deed of arrangement or composition permitted at the Common Law, but now regulated by statute; in respect that the latter arrangement or composition is not binding on the minority, even although accepted by a majority of the creditors, and in respect that, not being sealed with the seal of the court, or embodied in an order of the court, it is not summarily enforceable. Every such deed of arrangement or composition at the Common Law, is, however, now described as a 'deed of arrangement,' and is

governed by the Deeds of Arrangement Act, 1914, which applies to any assignment of property, or agreement for a composition, or deed of inspectorship, or letter of licence, made in respect of the affairs of a debtor for the benefit of his creditors generally or (in certain cases) for the benefit of any three or more of his creditors, otherwise than in pursuance of the bankruptcy laws. The Deeds of Arrangement Act, 1914, provides, amongst other matters, that : (1) every such document must be registered at the office of the Registrar of Bills of Sale ; (2) it will be void, unless before or within twenty-one days after its registration, or within such extended time as the Court may allow, it has received the assent of a majority in number and value of the creditors ; (3) the trustee under such a deed is required to give security to the Registrar of the Court having bankruptcy jurisdiction in the district of the debtor's residence or place of business, in a sum equal to the estimated assets available for distribution among the unsecured creditors, unless a majority in number and value of the creditors dispense with his giving security ; (4) a trustee who acts under such deed after it has to his knowledge become void by reason of non-compliance with the statutory requirements, or after he has failed to give security, is subjected to pecuniary penalties ; (5) the trustee may serve on any creditor a notice in writing of such deed having been executed, and of the filing of the certificate of the creditors' assents, with an intimation that the creditor will not, after the expiration of one month after service of the notice, be entitled to present a bankruptcy petition founded on the execution of the deed, or on any other act committed by the debtor in the course of or for the purpose of proceedings preliminary to the execution of the deed, as an act of bankruptcy. The effect of serving such notice is that, after the expiration of that period, the creditor

will not be entitled to present any such petition, unless the deed becomes void ; (6) the accounts of a trustee of a deed of arrangement may be audited, if such audit is asked for by an application in writing to the Board of Trade, on the part of a majority in number and value of the creditors.

#### NOTE ON AUTHORITIES.

[For a more detailed treatment of the subject of this chapter, the student should refer to Ringwood, "*Principles of Bankruptcy*," and (as to *Fraudulent Alienations*) Jenks, "*Modern Land Law*," pp. 293-298, and "*Digest of English Civil Law*," pp. 1058-1072.

See also the *Bankruptcy Acts*, and the *Deeds of Arrangement Act*, 1914.]



## CHAPTER XXXI.

## PREROGATIVE WRITS.

IT is, as has previously been remarked (Vol. I., p. 110) one of the most remarkable features of English Law that it places freely at the disposal of the subject certain highly effective remedies which were originally intended solely for the use of the Crown. Such a feature, so opposed to the general character of the State until the end of the eighteenth century, is a striking proof of the wholesome relations between rulers and ruled which have, with certain conspicuous exceptions, distinguished this country for many centuries. It is, therefore, important to examine the actual procedure for giving effect to these powerful remedies, or, as they are called, 'prerogative writs.'

The principal prerogative writs or proceedings are—(1) the writ of *habeas corpus*; (2) the writ of *mandamus*; (3) the information in the nature of *quo warranto*, which has taken the place of the former writ of *quo warranto*; (4) the writ of *prohibition*; (5) the writ of *certiorari*; and (6) the writ of *procedendo*. We shall shortly consider each of these.

(1) *The writ of HABEAS CORPUS*.—This is the prerogative remedy which the law has provided against violations of the right of personal liberty; because liberty is not absolutely secure unless a person who is kept in confinement without legal justification, has, in addition to his remedy by action for damages for

false imprisonment and for an injunction to prevent any threatened repetition (pp. 329-330), a means of being set free from his confinement.

The right to personal freedom is secured by the writ of *habeas corpus ad subjiciendum*. This is a writ directed to any person who detains another in custody; and it commands him to have the body of the person detained produced before the court, with the day and cause of his being taken and detained, so that the court may inquire into the cause of his detention, and if it is unlawful, at once set him free. The writ is most commonly granted by a Divisional Court of the King's Bench Division, upon motion, supported by affidavit showing a *prima facie* case of wrongful detention, for an order absolute or *nisi*, or by any Judge of the High Court during vacation; and it may be applied for by the person detained, or by any one on his behalf. In certain circumstances it may be obtained upon a summons or an *ex parte* application; apart from exceptional cases, counsel must appear. It is available as a method of testing the legality both of official and public imprisonments and of private, and even domestic detention. Thus, on the one hand, it may be granted against the Governor of a prison who has in his custody a prisoner detained without trial, or the commanding officer of a camp who is detaining a man who alleges that he is not liable to compulsory military service. On the other hand, it may be used *e.g.*, to try the legality of a husband's detention of his wife (*Reg. v. Jackson* [1891] 1 Q. B. 671), or the detention of a child in an institution, contrary (as the parents allege) to their wishes. But an interned alien enemy, or any other prisoner of war, is not entitled to a writ of *habeas corpus* to try the legality of his imprisonment (*Rex v. Vine Street Police Station Superintendent, Ex parte Liebmann* [1916] 1 K. B. 269). The writ will not be issued in the case

of a person who has been duly committed to prison for trial for felony or misdemeanor, or who is undergoing imprisonment after conviction; but one of its commonest uses is in extradition cases, to test the legality of a prisoner's commitment by a magistrate for the purpose of being extradited (Vol. IV., pp. 267-268).

Generally speaking, the Court will not, on the first or *ex parte* application, grant more than a rule *nisi*, directed to the respondent, bidding him appear and show cause why a rule absolute for the issue of the writ against him should not be made. The respondent then appears on the day named in the rule *nisi*; and the case is then argued on its merits (Crown Office Rules, rr. 216-227).

Disobedience to the writ is punishable by fine or imprisonment for contempt of court; and, in many cases, exposes the offender to heavy penalties recoverable by the person injured. According to circumstances, the writ may be sought at Common Law or under the Habeas Corpus Acts. But, in nearly all cases a common law writ is sought; for the Habeas Corpus Acts only made more effective the common law writ, and improved the procedure by which writs could be obtained, and checked the devices by which their effect could be evaded. A general statement as to the right of the subject to obtain the writ is to be found in s. 6 of the 16 Car. I. (1640) c. 10. The writ may be enforced in any part of the dominions of the Crown; but it has been provided, by the Habeas Corpus Act, 1862, that no writ of *habeas corpus* shall issue out of England into any colony or foreign dominion of the Crown, in which there is a lawful established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion. The procedure is governed by the Habeas Corpus Acts and the Crown Office Rules.

There are various other kinds of writs of *habeas corpus* ; but they are not of great practical importance, since changes of procedure and practice have provided other and more simple means of attaining similar results.

(2) *The writ of MANDAMUS*.—The power of issuing this writ belongs, by virtue of the Judicature Act, 1873, s. 34, primarily to the King's Bench Division. In its form, it is a command issuing in the King's name, and directed to any person, corporation, or inferior court, within the King's dominions, requiring him or them to do some particular thing therein specified which appertains to his or their office and duty. Its application is generally confined to cases where relief is required in respect of the infringement of some legal or quasi-legal duty of a public nature, and no adequate or convenient legal remedy by an action or other means is attainable. Thus, in a recent case (*R. v. Poplar Borough Council (ex parte London County Council and Metropolitan Water Board)*) (No. 1) [1922] 1 K. B. 72, the Court of Appeal held, that the existence of a statutory remedy of distress upon the goods of the Poplar Borough Council would not prevent the issue of peremptory writs of *mandamus* to that body to obey the precepts of the other two bodies and levy the rates duly assessed.

Among other cases, the writ may be granted to compel the admission or restoration of the applicant to any office of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting-house, or the like ; and it may also be granted for the production, inspection, or delivery of public books and papers, or to oblige bodies corporate to affix their common seal, or to compel the holding of a court, or the holding of an election to corporate



and other public offices. But the writ would be refused where there is no legal duty towards the applicant; as, for example, where it was sought to compel the Secretary of State for War to conform to the terms of a Royal Warrant as to the pay of military officers, and the only duty was therefore to the Crown and not to the applicant. Nor can the writ issue against the Crown; for the King cannot command himself to do an act, or attach himself if he refuses to do it.

An application for a writ of *mandamus* may be made, but only by counsel, to a Divisional Court on motion supported by affidavit; and, if a good *prima facie* ground is shown for granting it, the court usually makes a rule *nisi* directing the party complained of to show cause why a writ of *mandamus* should not issue. Notice of this order *nisi* is directed to be served on every person who, in the opinion of the court, ought to have notice of it. Any person affected may show cause against the issue of the writ; but if sufficient cause is not shown against the issue thereof, the order *nisi* will be made absolute, though at first in the alternative, either to do the thing commanded or else to signify some reason to the contrary, to which a *return* or answer must be made at a certain day. If the person to whom the writ is directed makes no return, he is punishable for his contempt by committal; and if he makes a return, and it be found either insufficient in law or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely, to which no other return will be admitted, except a certificate of perfect obedience to, and compliance with, the writ.

Where a judge, magistrate, or officer of an inferior court improperly refuses or omits to exercise, jurisdiction which he ought to exercise, the remedy is by writ of *mandamus*, or, in case of a judge or officer of

a county court, by an order having the effect of a writ of *mandamus*, which is obtainable on motion in a Divisional Court of the King's Bench Division; for it is the peculiar business of that Division to superintend inferior tribunals, and to compel them, where necessary, to exercise those judicial or ministerial powers with which they have been invested. A familiar example is the issue to the lord of a manor of a *mandamus* to admit the applicant to a copyhold tenement which he claims.

There must be distinguished from the prerogative writ, the *action of mandamus* created by s. 68 of the Common Law Procedure Act, 1854, now replaced by Order LIII. of the Rules of the Supreme Court, which is in the nature of an action for specific performance of a duty. The plaintiff in any action may endorse upon his writ of summons a notice that he intends to claim a *mandamus*, or order commanding the defendant to perform some duty of a public or quasi-public character, in which the plaintiff is interested, and to enforce which there is no other convenient remedy; and the judgment in the action may command the defendant to perform the duty in question. It seems that the *action of mandamus* will only lie when the plaintiff has a right of action (not necessarily for damages) against the defendant. The dividing line between the prerogative writ of *mandamus* and the statutory action of *mandamus* has not been clearly drawn; but the latter is sometimes used when it is desired to compel a local authority to levy a rate in order to satisfy a debt or other liability owing to the plaintiff.

Mention should also be made of a *mandatory order*, or an injunction in a positive form, *e.g.*, to pull down or remove a building, or to abate a nuisance, which is obtainable either in the course of an action (interlocutory) or as part of the judgment (final). Some

account of the remedy by injunction has previously been given (pp. 554–556).

(3) *Information in the nature of QUO WARRANTO*.—The prerogative writ of *quo warranto*, which is now obsolete, was in the nature of a writ of right for the Crown, against a person who claimed or usurped any office or franchise, to inquire, in order to determine the right, by what authority he supported his claim. It lay also in case of non-user of a franchise, or mis-user or abuse of it, commanding the defendant to show by what warrant he exercised the franchise, having never had any grant of it, or else having forfeited it by neglect or abuse. Under the modern practice, an information in the nature of a *quo warranto* may be issued out of the King's Bench Division on *information* filed by the Attorney-General; and this is properly a proceeding to punish the usurper by a fine, for the usurpation of the franchise, as well as to oust him or seize it for the Crown. It may also be issued at the suit of an interested private individual as *relator* for the purpose of trying the right of another to hold or exercise the privileges of an office, for instance, the right of a naturalised British subject to be a Privy Councillor (*R. v. Speyer* [1916] 2 K. B. 858), or the right to hold a municipal office, such as that of mayor, alderman, or councillor. But by the Municipal Corporations Act, 1882, s. 73, every municipal election which is not called in question within twelve months is deemed good and valid.

(4) *The writ of PROHIBITION*.—This writ may be directed to the Judge and any party to a suit in any inferior court, commanding them to cease from the prosecution thereof, on the ground that the suit is not within its jurisdiction; it is usually the party, and not the Judge of the inferior court, who appears

and shows cause against the issue of the writ. An application in civil proceedings in the King's Bench Division for a writ of prohibition is made to a Divisional Court by motion, or to a Judge in chambers by summons; it can also be moved for in the Chancery, or the Probate, Divorce, and Admiralty Division. Applications for prohibition to a county court or other inferior court in civil cases may be made to a Judge in chambers, on first obtaining, on *ex parte* application, leave to issue the summons. If the summons is granted and the application successful, the writ is issued, in pursuance of the Judge's order, at the Crown office. If, after a prohibition has been granted, either the judge of the court below, or any party to the cause or proceeding pending therein, proceeds in disobedience to it, an attachment may be had against him to punish him for contempt. A writ of prohibition can only be directed to a permanent judicial body exercising recognised authority (*Re Clifford and O'Sullivan* [1921] 1 A. C. 570).

(5) *The writ of CERTIORARI*.—This writ issues from the High Court to the Judge or officers of any inferior court of record, for the purpose of removing proceedings pending therein to the High Court. The writ may be had not only in civil but in criminal cases; but the consideration of the writ of *certiorari* in its relation to criminal cases belongs more properly to the next volume (Vol. IV., pp. 318–320). It may be well, however, to draw attention to the fact that a writ of *certiorari* can only issue to remove *judicial* proceedings. Thus, the High Court will not issue a writ of *certiorari* to remove an order made by a Court of a Company of Lightermen granting a licence to act as a lighterman (*R. v. Company of Watermen* [1897] 1 Q. B. 659). For such a body is not a judicial tribunal. Where civil proceedings are pending in



any inferior court, a defendant may apply for a writ of *certiorari*, on the ground that the matter is one more proper to be disposed of in the High Court; or that it is to be tried by a jury, and that no impartial jury can be obtained in the inferior court; or that difficult questions of law are likely to arise on the trial. The applicant must satisfy the High Court that it is desirable that the matter should be heard in the High Court. The vast majority of civil proceedings in inferior courts are commenced in county courts; and any proceedings commenced in a county court under the County Courts Acts may be removed to the High Court by a writ of *certiorari* or by order, if the defendant can satisfy the High Court that the matter is more fit to be heard in the High Court (County Courts Act, 1888, s. 126). But the High Court may impose terms as to payment of costs, giving security, and other matters. The most usual ground is, that difficult questions of law are likely to arise on the trial of a case of some importance. In an action of Replevin, the defendant has a right to remove the case into the High Court by a writ of *certiorari* on giving the required security (*ib.*, s. 137).

The application for leave to issue the writ is usually made in the King's Bench Division on summons before a Master in chambers, or in the Chancery Division to a Judge on motion or originating summons. The application may often be made *ex parte*; and the order will often be made absolute in the first instance.

(6) *Writ of PROCEDENDO*.—Where a writ of *certiorari* has issued improvidently, as for instance, where it does not lie at all, or is misdirected, or is otherwise bad in law, and also where a defendant has procured the issue of a writ of *certiorari*, but does not take the proper further steps in the proceedings in the

High Court, a writ of *procedendo* may be awarded to restore the action to the Court from which it was removed ; and a cause so sent back may never again be removed before final judgment.

*NOTE ON AUTHORITIES.*

[*For a more detailed treatment of the subject of this chapter reference may be made to the " Yearly Practice of the Supreme Court," and to Halsbury, " Laws of England," Art. " Crown Practice."*]

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## CHAPTER XXXII.

THE COUNTY COURTS, AND OTHER COURTS OF  
LIMITED OR SPECIAL JURISDICTION.

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WE have now to deal with the subject of courts of inferior or limited jurisdiction, of which by far the most important are the modern statutory county courts which cover the whole of England and Wales. After dealing with them, we shall mention briefly a few other inferior courts.

## THE COUNTY COURTS.

Before the creation of the modern county courts in 1846, the principal inferior courts of civil jurisdiction were the court baron, which was a court incident to every manor in the kingdom ; the hundred court, which was a larger court held for all the inhabitants of a particular hundred ; and the sheriff's county court, which was the principal court of civil jurisdiction in the kingdom, until practically superseded by the assize courts. These inferior courts became in course of time, in some cases owing to the limits on their jurisdiction and to the change in the value of money, in others owing to their archaic and dilatory procedure, of very little practical value in the administration of justice between the King's subjects. Attempts were accordingly made, in a few of the chief centres of population, to supply the much-felt want of local courts for the speedy and cheap recovery of small claims, by the establishment of *courts of request*.

By the year 1841 a little over a hundred of these local courts had been established in various parts of the kingdom, with jurisdiction in claims for debt or damages varying in amount from forty shillings to fifteen pounds. But they proved to be inadequate and unsatisfactory, chiefly because their jurisdiction was confined to sums of too trivial an amount, or restricted to particular places and to small districts; and in the year 1846, after various unsuccessful attempts by successive Parliaments to deal with the problem of local courts, the first County Courts Act (since repealed) was passed, establishing the modern county courts, which have superseded most, though not all, of the more ancient inferior courts of civil jurisdiction. (See a note to section 1 of the County Courts Act, 1888, in the *Yearly County Court Practice*.) Since 1846, the jurisdiction of the county courts has been extended by several statutes, and now rests on the County Courts Acts, 1888, 1903, and 1919, of which that of 1888 is the principal Act, and on the County Court Rules made thereunder.

In accordance with the provisions of the principal Act, England and Wales are mapped out into more than fifty-three circuits, comprising an aggregate of four hundred and sixty-six courts. There are fifty-four Judges, appointed by the Lord Chancellor; and for each court in the circuit a registrar is appointed by the Judge, with clerks and subordinate officers and bailiffs to transact the business of the court.

*Common law jurisdiction.*—A county court has jurisdiction in all personal actions founded on contract or tort, (except actions for breach of promise of marriage, libel, slander, or seduction;) provided the claim is not for more than £100 (1888, ss. 56, 57). If the claim exceeds £100, the court has no original jurisdiction to try the action, except by consent of the parties; but the claimant may bring his action



in the county court by abandoning the excess of his claim over £100 and stating the abandonment in the particulars of his claim. He cannot, however, after judgment, bring another action to recover the abandoned excess; nor can he divide his cause of action and bring two or more actions for amounts within the limit. But, if he has two or more distinct causes of action against the same defendant, he may bring separate actions in respect of them, and thus divide his total claim (s. 81).

There is no obligation on any person not to bring in the High Court an action which could be brought in a county court; but a plaintiff runs the risk of being deprived of costs if he recovers in the High Court a sum within the limit of the county court jurisdiction. Thus, if the plaintiff in an action brought in the High Court on contract recovers less than £40, or in an action on tort he recovers less than £10, he will not be entitled to *any* costs of the action; and if on contract he recovers £40 or more, but less than £100, or on tort recovers £10 or more, but less than £50, he will not be entitled to recover any more costs than he would be entitled to if the action had been brought in a county court; unless, in any of the cases above-mentioned, the Judge who tries the action certifies that there was sufficient reason for bringing the action in the High Court instead of the county court. And in an action in a county court the judge may, irrespectively of the amount recovered, award costs on a higher scale than that which would otherwise be applicable; if the action involves a novel or difficult point of law, or if the question litigated is of general or public interest (s. 119).

In actions of Replevin, which are generally brought in cases of wrongful distress for rent, the county court has jurisdiction up to any amount. But if the rent in arrear, or the value of the goods seized, exceeds

twenty pounds, or there is good ground for believing that the action will involve a question of title to land of which the yearly value or rent exceeds twenty pounds, the plaintiff may bring the action in the High Court, or the defendant may, on application by summons to a Master in chambers in the King's Bench Division, and on giving security for costs, obtain an order removing the action from the county court to the High Court (s. 137).

In actions for the *recovery of land or tenements*, the county court has jurisdiction where neither the annual value nor rent of the property in dispute exceeds £100 (see p. 680). For this purpose, 'the property' means the fee simple of the land and buildings, if any (*Angel v. Jay* [1911] 1 K. B. 66), not the value of the interest sought to be recovered.

It may be here observed, that a county court has no jurisdiction, except by consent of the parties, to try any action in which the title to any toll, fair, market, or franchise comes in question. Thus it has been held, that there is no jurisdiction in a county court to try an action for infringement of patent, in which the validity of the patent is disputed.

But a county court has, under its common law jurisdiction, power to try an action brought to recover the balance of a partnership account, or any legacy under a will, or the distributive share of personal estate under an intestacy; provided in each case that the amount claimed does not exceed £100.

A county court has, moreover, power to try *any* common law action; where the parties so agree by a memorandum signed by them or their solicitors. But if an action is commenced in the county court over which the court has no jurisdiction, the judge must, unless the parties consent to the court having jurisdiction, order it to be struck out.

*Equitable jurisdiction.*—A county court has concurrent jurisdiction with the High Court in the follow-

ing actions, provided the amount of the estate, property, or sum involved does not exceed £500, viz. :—administration suits, actions for the execution of trusts, for foreclosure or redemption of mortgages, for the dissolution of partnerships, for specific performance or rectification of agreements for the sale or lease of any property, for relief against fraud or mistake, and proceedings relating to the maintenance of infants, or under the Trustee Acts (s. 67). In all such actions and matters, the county court judge has all the powers of a judge of the Chancery Division; including the power to grant injunctions, to order attachment of the person, and to appoint a receiver by way of equitable execution (Judicature Act, 1873, s. 89). But his power in such matters is limited to such cases as would, apart from any claim to equitable relief, have been within his jurisdiction (*R. v. Cheshire C.C.* [1921] 2 K. B. 694).

*Jurisdiction in actions remitted from the High Court.*  
—Where, in any action on contract or on tort, brought in the High Court, the amount claimed or remaining in dispute in the action or on a counter-claim does not exceed £100, either party may at any time apply by summons to order the claim and counter-claim to be tried in a county court; and the Master or District Registrar, if he thinks fit, will make the necessary order for transfer to a county court (Act of 1888, s. 65; Act of 1919, s. 1). If the plaintiff in any action of tort in the High Court has no visible means of paying the defendant's costs in the event of the plaintiff failing in the action, the defendant may, whatever be the amount claimed, apply by summons, supported by affidavit, for an order that, unless the plaintiff give security for the defendant's costs, the action be remitted to a county court. The Master or District Registrar, as in the previous case, has a judicial discretion whether he will make the order, having regard to all the circumstances of the

case (Act of 1888, s. 66 ; Act of 1919, s. 2). In addition, actions in the High Court for the recovery of land by a landlord against a tenant or a person claiming through him, which could have been commenced in a county court, may be transferred to a county court.

When an order is made remitting the action to a county court, the plaintiff must lodge with the registrar of the county court the order, the writ, and the other documents filed in the action ; and the action then proceeds in the county court, as if it had been originally commenced there, and will be subject to the County Court Rules.

*Interpleader* proceedings instituted in the High Court by a person in possession of money or goods adversely claimed by two or more persons, may also, by virtue of the Judicature Act, 1884, s. 17, be ordered to be transferred to a county court, where the amount or value of the matter in dispute does not exceed £500, and the questions at issue may be more conveniently tried in a county court.

An order may also be made in the Chancery Division transferring any action therein which a county court has power to try under its equitable jurisdiction (Act of 1888, s. 69).

*Effect of Judicature Acts.*—So far we have dealt chiefly with the jurisdiction conferred by the County Courts Acts of 1888, 1903, and 1919. But the effect of the Judicature Acts has to be considered ; for, although they do not add to the classes of actions which the county courts have jurisdiction to try, they do in a very important way enlarge the powers and duties of the judge of a county court. For the Judicature Act of 1873 compels him to grant, in every action which he has jurisdiction to entertain, the same relief and remedy, and give effect to the same legal or equitable grounds of defence, as if the action were tried



in the High Court. By the combined effect of section 90 of that Act and section 18 of the Judicature Act, 1884, a defendant in any action in a county court may set up by way of counter-claim against the plaintiff any right or claim which he may have against him, whatever its nature may be; and, although the counter-claim may involve matter which is beyond the jurisdiction of the court, the court has full power to give effect to it, unless the plaintiff has, within two days after receiving notice of the counter-claim, given notice in writing objecting to the jurisdiction. When such objection is taken, the judge can still give effect to the counter-claim up to the amount which the plaintiff is entitled to recover on the claim, and so defeat the plaintiff's claim; leaving the defendant to sue for the balance in a fresh action. The judge may, however, in any case where the counter-claim is beyond the jurisdiction of the court, adjourn the trial of the action to enable either party to apply for its removal to the High Court; or he may give judgment on the claim, and stay execution for such time as may be necessary to enable the defendant to establish his counter-claim, by bringing an action in respect of it in the High Court.

*Choice of court.*—As regards the choice of the court in which the plaintiff is to sue, it is provided (s. 74 of the Act of 1888) that the plaintiff in county court proceedings may (with certain exceptions) bring his action in the court within the district of which the defendant dwells or carries on business, or (by leave of the judge or registrar, to be granted or not at his discretion) in the court within the district of which the defendant dwelt or carried on business at any time within six months before the commencement of the action, or (by the like leave) in the court within the district of which the cause of action wholly or in part arose, without regard to the place of residence

or business of the defendant. (When both parties dwell or carry on business within the jurisdiction of one or more of the metropolitan county courts, the plaintiff has the further option of resorting to the county court of his own district). But actions relating to land must be brought in the court of the district within which the land is situate ; and, similarly, actions of Replevin in the court of the district in which the goods or cattle are distrained.

*Procedure.*—The plaintiff commences his action by filing a *præcipe*, containing the names and addresses of the parties, a short statement of the cause of action, and the amount of the debt or damages claimed ; at the same time entering a *plaint* in a book kept by the registrar for the purpose. At the time of entering the *plaint*, the plaintiff must also file particulars of his claim ; unless, being for debt or damages only, it does not exceed £2. Thereupon a *summons* is issued by the registrar, and served on the defendant.

On the day named in the *summons*, the plaintiff must appear to support his claim ; and, unless the defendant appears, the plaintiff, on proving his case in court, is entitled to judgment. If the plaintiff has (by leave) issued a *default summons* for any debt or liquidated demand, he may, unless the defendant gives notice of defence within the prescribed period, sign judgment without further proof. As a general rule, the defendant may set up at the trial any ground of defence, without previous notice of it to the plaintiff ; but if he intends to rely on any special or statutory defence, such as the defence of infancy, bankruptcy, tender, the Limitation Act, the Statute of Frauds, or any equitable defence, or to set off, or set up by way of counter-claim, any debt or demand against the plaintiff, he must before the trial give notice of it in writing to the registrar, whose duty it is to communicate it to the plaintiff.

*Jury.*—Actions in county courts are usually tried before the judge alone ; but where the court or a judge is satisfied, on an application made by either party, that the action cannot as conveniently be tried with a jury as without a jury, the court or judge has power, subject to certain exceptions similar to those prevailing in the High Court (pp. 517–518), to order the action to be tried without a jury (Administration of Justice Act, 1920, s. 3). This section, which has only recently come into force, and seems to be a distinct departure from recent tendency in the matter of juries, appears to assume that most county court actions will be tried with a jury ; for it merely empowers the judge, if satisfied that the action cannot as conveniently be tried with as without a jury, to order a trial without a jury, except in certain cases. Where there is a jury, it consists of eight persons ; and it must be unanimous in its verdict.

*Appeals.*—No appeal lies from the finding of any fact by a county court judge or jury ; but if either party to the action is dissatisfied with the decision or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party dissatisfied may, if the point of law has been taken before the county court judge (but not otherwise), appeal to the High Court. In no case, however (unless by special leave of the judge), is there any right of appeal in an action of contract or tort (other than in ejectment or in actions involving title to land), where the debt or damage claimed does not exceed £20, or in any action of Replevin, where the amount of the rent or the value of the goods does not exceed £20, or in any action for the recovery of tenements, where the yearly rent or value does not exceed £20, or in interpleader proceedings, where the money claimed or the value of the goods does not exceed £20. The appeal is brought, by notice

of motion, to a Divisional Court of the King's Bench Division; and the Divisional Court has power to draw any inference of fact. An appeal lies from the Divisional Court to the Court of Appeal; provided leave is given by the Divisional Court or by the Court of Appeal. In equity matters, whatever the amount claimed, an appeal lies to the Divisional Court of the King's Bench Division without leave. In every case, whether tried by the judge, with or without a jury, or by the registrar, the county court judge has himself the power, to be judicially exercised, to order a *new trial*, upon such terms as he shall think reasonable.

*Execution.*—A judgment for the payment of money may be enforced by execution against the goods of the judgment debtor under a warrant empowering the bailiff of the court to seize and sell sufficient of them to satisfy the amount of the judgment and costs. The judgment may be enforced within the district of another county court; and may also be executed in Scotland or Ireland, by registering in the corresponding court there a certificate of the judgment (Inferior Courts Judgments Extension Act, 1882). A judgment for the payment of money may also be enforced by attachment of any debts due to the judgment debtor. Under the Debtors Act, 1869, the judge of the county court has power to commit to prison, for a period not exceeding six weeks, a judgment debtor who, though able to pay the amount of the judgment debt or the instalments ordered to be paid, fails or refuses to do so. To obtain a committal order, a *judgment summons* must be issued, and be served personally on the debtor; and the burden of proving that the debtor has the means to pay lies on the judgment creditor. Imprisonment under the order of the judge does not operate as a satisfaction of the debt; but the debtor may obtain his liberty at any time by paying the sum ordered. A judgment for the recovery



of land or any tenement may be enforced by warrant of possession. The judge has, as we have said, power to appoint a receiver of an interest in land by way of equitable execution in cases within his jurisdiction.

*Miscellaneous Jurisdiction.*—In addition to the jurisdiction conferred by the County Courts Acts, numerous statutes have from time to time been passed since 1846, which give further jurisdiction to county courts in matters of the most varied kind. The jurisdiction so conferred is in some matters concurrent with that of the High Court; in others it is exclusive, and comprises, amongst a large variety of matters, the following kinds of jurisdiction:—

1. *Under the Employers' Liability Act, 1880.*—An action by a workman for personal injuries, or by the representatives of a deceased workman to recover damages from the employer under this Act, *must* be brought in a county court. The maximum amount of compensation recoverable is three years' earnings (see pp. 301–303).

2. *Under the Workmen's Compensation Act, 1906.*—When any question arises under this Act, as to the liability to pay compensation, then, unless settled by agreement, it must be settled by arbitration under the Act. In the absence of agreement between the parties, the county court judge is the arbitrator to settle any question in dispute, in accordance with the provisions of the Act and the Workmen's Compensation Rules made thereunder (see pp. 303–307). An appeal, when it lies, is direct to the Court of Appeal.

3. *Bankruptcy jurisdiction.*—Under the provisions of the Bankruptcy Act, 1914, ss. 96–124, and the Rules made thereunder, the county court of the district in which the debtor resides or carries on business, other than the London Bankruptcy district, has a wide bankruptcy jurisdiction; in virtue of which it has all the powers of the High Court, and may decide any

question of law or fact arising in any bankruptcy case. In cases arising out of the bankruptcy, there is no limit to such jurisdiction ; but the judge may refuse to try cases in which large amounts are involved, or, if a difficult question of law arises, he may state a special case for the determination of the question by the High Court. In questions between the trustee in bankruptcy and strangers, the jurisdiction is limited to cases in which the amount in dispute does not exceed £200 ; unless all the parties consent.

Under section 122 (unrepealed) of the Bankruptcy Act, 1883, any county court has also power, where a judgment debtor is unable to pay the amount of the judgment debt, and his whole indebtedness does not exceed £50, to make an order for the *administration* of his estate, and for the payment of his debts by instalments. To obtain such order, the debtor must file a request and statement, setting out the names and addresses of all his creditors and the amounts of the debts due to them. Notice is then given by the registrar to the creditors, who may attend the hearing of the debtor's application and prove their debts, if objected to by the debtor or any other creditor ; but all debts set out in the list are, unless objected to, taken as proved. The court may order the debts to be paid in full, or by such composition as appears practicable ; and may order the debts or composition to be paid into court by instalments and distributed by the registrar.

The effect of the order, unlike that of an adjudication, is not to divest the debtor of his property, but to make his present and future property subject to the control of the court during the continuance of the order ; and no existing or subsequent creditor can take proceedings during the currency of the administration order, in respect of any debt notified by the debtor, except by leave of the court. Any person who becomes a creditor

after the date of the order may send in his claim to the registrar, and, on proof of his debt, be scheduled as a creditor ; but he is postponed until those scheduled as creditors before the date of the order have been paid, to the extent provided by the order. All sums paid or levied under the order are paid into court, and appropriated, after payment of costs, to payment of dividends from time to time to the creditors whose debts have been admitted or proved. County courts exercising jurisdiction in bankruptcy have also certain powers in connection with deeds of arrangement (Deeds of Arrangement Act, 1914, ss. 18 and 23).

4. *Winding-up jurisdiction*.—Under section 131 of the Companies (Consolidation) Act, 1908, repealing the Companies (Winding-up) Act, 1890, a county court (whose jurisdiction in this respect has not been excluded by the Lord Chancellor) has power to make an order to wind up a company, whose registered office is within the district of the court, and whose paid-up capital does not exceed £10,000. Proceedings are commenced by petition ; and the county court has all the powers of the High Court in such proceedings.

5. *Probate jurisdiction*.—Under the Intestates (Widows and Children) Act, 1873 and 1875, the registrar of a county court has power to obtain a grant of letters of administration to the widow or children of a person who has died intestate within the district of the court, leaving estate not more than £100 in value ; if such widow or children reside more than three miles from a Probate Registry. Under the Court of Probate Acts, 1857 and 1858, the judge of a county court has a limited contentious jurisdiction, concurrent with that of the Probate Division, in actions to prove a will in solemn form, or to obtain letters of administration, or to revoke a grant of probate in common form or of letters of administration. To found this jurisdiction, the personal estate of the

deceased must be under the value of £200, and the real estate under the value of £300.

6. *Admiralty jurisdiction*.—By the County Courts (Admiralty Jurisdiction) Acts, 1868 and 1869, and Orders in Council made thereunder, a limited jurisdiction to try the following admiralty actions was conferred upon most of those county courts which are held in the neighbourhood of the sea ; that is to say :—

- (i) any claim for salvage services rendered to a ship or cargo, where the value of the property saved does not exceed £1000, or the amount claimed does not exceed £300 ;
- (ii) any claim for towage of a ship, or for necessities supplied to a ship, or for wages earned by any person engaged on a ship, where the amount claimed does not exceed £150 ;
- (iii) any claim, not exceeding £300, for damage to cargo, or damage by collision, or for damage to ships, whether by collision or otherwise ;
- (iv) claims not exceeding £300, arising out of agreements in relation to the use or hire of any ship, or to the carriage of goods therein, or out of any tort in relation to such goods.

The admiralty jurisdiction conferred by the Acts may be exercised either by proceedings *in personam*, or by proceedings *in rem*—that is to say, by arrest of the ship or cargo to which the claim relates. The procedure is regulated by the rules contained in Order XXXIX. of the County Court Rules, and is very similar to that in an action in the Admiralty Division of the High Court (pp. 622–627).

The action may be commenced in the court having admiralty jurisdiction within the district in which the vessel or property to which the claim relates is situated at the commencement of the proceedings ; or, if the foregoing rule is not applicable, in the court having admiralty jurisdiction in the district in which the



owner of the vessel or property, against which proceedings (if they had been *in rem*) would have been taken, or his agent in England, resides ; or, if such owner or agent does not reside within any such district, then in the court having admiralty jurisdiction in the district nearest to the place where such owner or agent resides ; or, by leave of the judge or registrar, in any court having admiralty jurisdiction in which the action could have been brought if it had been a common law action commenced under section 74 of the County Courts Act, 1888 (p. 681-682), or which the parties agree in writing shall have jurisdiction.

*Appeals.*—An appeal lies from an admiralty decision of a county court to a Divisional Court of the Probate, Divorce, and Admiralty Division of the High Court. The appeal may be brought (i) on a question of law under section 120 of the County Courts Act, 1888, without leave where the amount of the debt or damage claimed is £20 or over, and only with leave when the amount is under £20 ; and (ii) on a question of fact, under the County Courts (Admiralty Jurisdiction) Act, 1868, where the amount decreed or ordered to be due exceeds £50, and security is given for costs. No leave is required for an appeal from a final order or judgment ; while leave is probably necessary in the case of an appeal for an interlocutory order or decree. Such is believed to be the effect of the combined provisions of the two statutes above mentioned ; but the matter is uncertain.

Appeals are usually brought by notice of motion ; but there is an alternative method known as an “instrument of appeal.”

#### OTHER COURTS OF LIMITED OR SPECIAL JURISDICTION.

In addition to the county courts, there are, still existing, some tribunals whose powers are restricted

either to a particular class of cases, or to cases involving a limited amount of money, or to cases arising within a particular area. We propose to deal very briefly with a few of the more important of these.

I. *Borough courts*.—Although the establishment and rapid extension of the system of county courts largely superseded such of the ancient local courts as had not already ceased to act, yet a few of the latter have survived in the struggle for existence, and do useful work at the present day. Conspicuous among them are the Lancaster Chancery Court, and the Palatine Court of Durham, which are superior courts, and of which some account has been given in an earlier chapter (pp. 473–474); and the Liverpool Court of Passage, the Hundred Court of Salford, and the Bristol Tolzey Court. It is difficult, in a general work, to give any satisfactory account of the numerous borough and other local courts, owing to the fact that each is governed largely by its own special charters and statutes; but they are enumerated and briefly described in Halsbury's *Laws of England*, Volume IX., *Courts*, Parts XVII. and XVIII. There are, however, a few provisions on the subject which may profitably be noted.

Thus it was provided, by the Small Debts Act, 1845, that, in the case of many inferior courts for the recovery of small debts, on the first vacancies which should occur after the passing of that Act, the position of judge should be filled by the appointment of a barrister or special pleader, or of an attorney who had practised as such for at least ten years, who should be removable by the Lord Chancellor for incapacity; and that such judge should be entitled to appoint a deputy, similarly qualified, to act for him in case of his unavoidable absence. And the Municipal Corporations Act, 1882, has now added, that the recorder of the borough,

where there is one, shall be judge of the court in all cases except where the court is regulated by local Act of Parliament, or where a barrister of five years' standing acted as judge or assessor at the passing of the Municipal Corporations Act, 1835.

Again, the Judicature Act, 1873, s. 88, provided for the enlargement of the jurisdiction of such courts, by empowering the Crown, by Order in Council, to vest in them equity and admiralty jurisdiction; and the Municipal Corporations Act, 1882, s. 185, enabled the Crown to extend the jurisdiction of any borough civil court over any district within the jurisdiction of the borough Quarter Sessions, and thus to make the local civil and criminal jurisdiction co-terminous. On the other hand, the County Courts Act, 1888, s. 7, empowers the Crown, on the petition of the locality, to exclude the jurisdiction of any local court other than a county court, in any causes whereof the county court has cognisance.

The Boroughs and Local Courts of Record Act, 1872, also contains some useful provisions regulating the procedure of such tribunals, many of which are still in force; more especially those relating to the fees which may be taken, and the statement of a case for the opinion of a superior court. But, owing to the great utility and activity of the county courts, the other tribunals of small local civil jurisdiction have, with the few exceptions noted above (which are generally regulated by their special Acts of Parliament), sunk greatly in importance. From this statement must, however, be also excepted one conspicuous example, viz. the Mayor's Court of the City of London, now united with the City of London Court to form the court which we are just about to describe.

II. *The Mayor's and City of London Court*, which is held in the City of London, was formed under the

Mayor's and City of London Court Act, 1920, by amalgamating the City of London Court (which was made a county court in 1867) and the Mayor's Court, one of the most ancient courts in the kingdom. The judges are the Recorder of the City of London, the Common Serjeant, the Assistant Judge of the old Mayor's Court, and one or two additional judges appointed by the Lord Chancellor.

*Procedure and jurisdiction.*—The new court thus formed has all the powers and jurisdiction of both the amalgamated courts. In the case of causes which are within the jurisdiction of a county court, the new court is deemed to be a county court; and, speaking generally, the statutes and rules applicable to county courts apply. In the case, however, of a cause which could not have been brought in the City of London Court, but could have been brought in the Mayor's Court, before the passing of the Act, called 'an original Mayor's Court Action,' the procedure consists of an adaptation of the Rules of the Supreme Court in lieu of the somewhat antiquated procedure which prevailed in the Mayor's Court before the amalgamation (Mayor's and City of London Court Rules, 1921). The jurisdiction thus inherited by the new court from the Mayor's Court comprises both common law and equity matters. It has a common law jurisdiction *concurrent* with that of the High Court, however large the amount in dispute may be, in all actions of contract, tort, or ejectment, where the cause of action arises *wholly* within the limits of the City of London. It has also *exclusive* jurisdiction in claims arising out of indentures of apprenticeship in the City. If any part of the cause of action arises outside of the City, the court has no prescriptive jurisdiction; but by the Mayor's Court of London Procedure Act, 1857, it has jurisdiction in claims for debt or damages not exceeding £50, if the cause



of action arose in part within the City, or if the defendant dwelt or carried on business in the City at the time of the commencement of the action, or at some time within six months before action brought.

The new court also inherits a certain jurisdiction, conferred upon the Mayor's Court by Orders in Council, under the Bills of Exchange Act, 1855, the Arbitration Act, 1889, the Partnership Act, 1890, and other statutes. The court has an equitable jurisdiction similar to that of the Court of Chancery before the Judicature Acts, in cases where the whole cause of action arises within the City. Independently, however, of its prescriptive equity jurisdiction, the court has the like power under the Judicature Act, 1873, to grant, in every action within its jurisdiction, the same equitable relief or remedy as a judge of the High Court or a county court. Thus, the court has power to grant injunctions and decree specific performance of contracts, and to give effect to any counter-claim.

*Appeals.*—In the case of 'an original Mayor's Court Action,' an appeal lies to the Divisional Court of the King's Bench Division upon a point of law or of the admission or rejection of evidence, without leave where the amount claimed exceeds £20, but only with the leave of the judge who tried the case where the amount claimed does not exceed £20. It is also open to a dissatisfied party to apply to the judge who tried the action, for a new trial. Appeals in other actions are governed by the Rules relating to appeals from County Courts, and lie to the Divisional Court of the King's Bench Division, or, in admiralty matters, to the Divisional Court of the Probate, Divorce, and Admiralty Division.

III. *The Courts of the Universities of Oxford and Cambridge.*—These are courts subsisting under antient charters granted to these universities, and confirmed

by Act of Parliament. The Court of the Chancellor of the University of Oxford, which is still in operation is presided over by the vice-chancellor or his deputy, and has a certain jurisdiction in (*inter alia*) most actions of a civil nature in which any member, or at any rate any resident member, of the university is a party; and this jurisdiction is not confined to cases in which the cause of action arises within the liberties of the university. In addition to what may be termed its voluntary jurisdiction, it has also an exclusive jurisdiction in many or most civil actions brought *against* resident members of the University; and the Chancellor may assert this privilege, in the case of an action in the High Court brought against such member, by entering a *claim of conusance*, that is, by claiming the cognisance of the matter, whereupon the action is withdrawn from the High Court and transferred to the university court. This claim was made and conceded by the Queen's Bench Division in 1886 in the case of *Ginnett v. Whittingham* (16 Q. B. D. 761), an action by a plaintiff having no connection by membership or residence with the University or town of Oxford, for damages for libels published in London by a resident undergraduate member of the University. The claim of conusance was only grudgingly conceded by the Queen's Bench Division; and it does not seem likely that similar claims will now be made.

The procedure in the Court of the Chancellor of the University of Oxford is, for the most part, regulated according to the Civil Law (Vol. I., pp. 34-35), but is subject to any specific rules made by the Vice-Chancellor of the University with the approval of the Rule Committee. The procedure on appeals is like that on appeals from other inferior courts; the appeal being to a Divisional Court of the High Court of Justice.

The Chancellor of the University of Cambridge has a similar court; but its jurisdiction over persons who

are not members of the University was taken away by the Cambridge Award Act, 1856, s. 18, and the court is not at present in operation.

A more detailed account of these two University Courts will be found in Halsbury's *Laws of England*, Vol. IX., *Courts*, Part XVII.; and their criminal jurisdiction is referred to in Vol. IV. (p. 250) of this work.

IV. *The ecclesiastical courts*.—These courts, as has previously been remarked, had jurisdiction in testamentary and matrimonial causes until 1857; when, by the Court of Probate Act, and the Matrimonial Causes Act, their jurisdiction in these matters was transferred to and vested in the Court of Probate and the Court for Matrimonial Causes, two purely secular tribunals, which are now represented in the Probate, Divorce, and Admiralty Division of the High Court.

But in ecclesiastical matters the following ecclesiastical courts have retained a certain jurisdiction: (1) the court of the bishop, otherwise called the Consistory Court; (2) the Provincial Court of the archbishop; (3) the Judicial Committee of the Privy Council. (The archidiaconal courts may be regarded as having fallen into abeyance.)

1. *The Consistory Court* is held by each archbishop and bishop in his diocese for the trial of certain ecclesiastical causes arising within the diocese. To this court have been specially assigned all proceedings instituted against clerks (for immorality and the like) under the Clergy Discipline Act, 1892. The chancellor of the diocese (or his commissary) is the judge; and, under 24 Hen. VIII. (1532) c. 12, an appeal lies from this court to the Provincial Court of the archbishop, save as regards proceedings under the Clergy Discipline Act, 1892, the appeal in which is (at the option of the

appellant) either to the Provincial Court or to the Judicial Committee, and is confined (unless special leave is given) to questions of law. The principles governing the grant of leave to appeal on a question of fact were recently stated by the Judicial Committee in the case of *Wakeford v. Bishop of Lincoln* [1921] 1 A. C. 813.

2. *The Provincial Courts of the two archbishops.*—The Provincial Court of the Archbishop of Canterbury, which used to be called the Court of Arches, and the Provincial Court of the Archbishop of York, which used to be called the Chancery Court of York, were united by the Public Worship Regulation Act, 1874, which provided, that the two archbishops might (subject to the approval of the Crown) appoint “a “judge of the Provincial Courts of Canterbury and “York,” and that all proceedings taken before him should be deemed to be taken in the Arches Court of Canterbury or the Chancery Court of York, as the case might require. The proper jurisdiction of the court is to determine appeals from the sentence of all inferior ecclesiastical courts within either province; but original suits may also be brought therein, *i.e.*, suits the cognisance of which belongs properly to the inferior jurisdictions within the province, in respect of which the inferior judge has waived his jurisdiction and, by ‘letters of request,’ referred the cause to the judge of the Provincial Courts.

3. *The Judicial Committee of the Privy Council.*—Appeals from the Archbishops’ courts lay before 1832 to the Court of Delegates; but since that year appeals from the Provincial Courts (and in certain cases direct from the Consistory Courts) are referred for decision to the Judicial Committee of the Privy Council, and provision is made for the appointment of certain of the archbishops and bishops to attend as assessors of the Judicial Committee on the hearing of such appeals.



Some account has already been given (Vol. I., pp. 340–344) of the criminal and disciplinary jurisdiction of these courts in respect of the clergy ; such vestiges as remain of their ancient jurisdiction over injuries of a pecuniary character, *e.g.*, the subtraction of tithes or non-payment of ecclesiastical dues, the spoliation of benefices, and dilapidations, are not of sufficient importance to call for treatment in this work.

The rules followed and the procedure administered in the ecclesiastical courts are for the most part based upon the Civil and Canon Laws.

V. *Courts martial*.—Under the statutes and Orders regulating the Navy, the Army, and the Air Force respectively, provision is made for the summoning of courts martial for the trial and punishment of members of these forces for offences against ‘ military law ’ ; but the subjection of these persons to ‘ military law ’ (a compendious term given to the codes of law prevailing in these forces respectively) does not involve their immunity from the jurisdiction of the ordinary civilian courts of the land. No appeal lies from a court martial to any civilian court ; but there exist securities against the excessive or otherwise improper exercise of the jurisdiction of courts martial in the form of the writs of *prohibition*, *certiorari*, and *habeas corpus*, which we have already mentioned (Chap. XXXI.). The constitutional position of courts martial is described in Anson’s *Law and Custom of the Constitution* (3rd ed.), vol. ii., part ii., pp. 185–189.

The law administered by courts martial must not be confused with ‘ martial law ’ in either of the senses in which that expression is sometimes used, as explained by Professor Dicey (*Law of the Constitution*, Ch. VIII., Martial Law), that is, (i) “ the common law right of “ the Crown and its servants to repel force by force

“ in the case of invasion, insurrection, riot, or generally  
“ of any violent resistance to the law ” ; and (ii) in  
the term “ proclamation of martial law,” which  
preludes “ the government of a country or a district  
“ by military tribunals, which more or less supersede  
“ the jurisdiction of the Courts ” (Vol. I., pp. 197–199).

*NOTE ON AUTHORITIES.*

*[For more detailed treatment of the County Courts, reference should  
be made to the “ Yearly Practice of the County Courts.”]*

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## CHAPTER XXXIII.

## PROCEEDINGS AFFECTING THE CROWN.

HITHERTO, we have assumed that all parties to a civil action will be private persons, whether corporate or individual, native or foreign. And this is a proper assumption, because, in the vast majority of cases, proceedings by or in the name of the Crown are of a criminal nature, and are, indeed, properly described as 'pleas of the Crown,' which are dealt with in Volume IV. of this work. But it often happens, for various reasons, that the Crown will sue a private person in one of its own civil tribunals; and it also sometimes happens, that, with proper reservations, it will submit to be sued in such tribunals. Naturally, however, such proceedings, by and against the Crown, which nearly always take place in the superior courts, are marked, owing to the prerogative character of the Crown, by certain peculiarities, of which we shall now proceed to give a brief account. And we shall consider, first, the remedies available to a subject in respect of injuries suffered from the Crown, and, secondly, the remedies available to the Crown in respect of injuries sustained by it at the hands of a subject.

## I. REMEDIES AGAINST THE CROWN.

(a) *Against the Crown itself*.—Whatever the reason may be, whether it be the exalted position of the King, or the fear lest the King, being the fountain

of justice, and present, in the person of one of his judges, in almost every court of justice, might find embarrassment in doing justice in a proceeding to which he was a party, it is a general rule of our law, that no action can be brought against the King, either in his personal or his official capacity. So a person who is knocked down by the King's motor-car while it is being negligently driven by his chauffeur, or who is wrongfully imprisoned by one of the King's servants, has no action against the King ; though his action against the King's servant who injured him cannot be defeated by the mere allegation that the defendant is the servant of the King, or even (to put an extreme and improbable case) that he acted by the King's command. This general principle, however, of the immunity of the Crown, is qualified by a process of great importance known as a 'petition of right,' whereby the King is, in certain cases, graciously pleased to allow himself to be sued, and will make compensation if the court hearing the petition of right should decide that compensation is, in accordance with the principles governing the scope of that remedy, properly due. The remedies of private persons against the Crown will, therefore, best be ascertained by inquiring: (i) who may bring a petition of right ; (ii) to what injuries it is applicable ; (iii) what procedure governs it.

(i) *Who may bring a petition of right.*—Although in many treatises and in the Petition of Right Act, 1860, this proceeding is referred to as the remedy of the 'subject,' the better opinion is that the remedy is also available to an alien friend. It may also be brought by the personal representatives, or by the assignee, of a person entitled to bring it.

(ii) *To what injuries is it applicable?*—The short answer to this question is, that it lies to recover damages for breach of contract, or to recover real or



personal property taken or withheld by the Crown, or compensation for land so withheld; but not in respect of torts, except in so far as concerns the taking or withholding of land. We must, however, examine this matter more closely. Contracts are one of the most fruitful sources of petitions of right; and both liquidated and unliquidated damages for breach of contract may be recovered. One kind of contract, however, requires special consideration, namely, employment; for the servants of the Crown, whether civil, military, naval, or (presumably) in the air-force, have no enforceable contract against the Crown, and (except certain Judges and the Controller and Auditor-General (see Vol. I., p. 234)) they hold their appointments only during the pleasure of the Crown. This rule applies both to commissioned officers and to private soldiers (*Leaman v. The King* [1920] 3 K. B. 663), who cannot, therefore, sue the Crown for their pay, or for alleged wrongful dismissal. Certain other money claims, such as claims to pensions, to the personal estate of an intestate, to the repayment of death duties and other dues which have been wrongly exacted or overpaid, may, however, be made by petition of right. Land and specific chattels personal taken by the Crown may be recovered in this way; and compensation in respect of land so taken may be obtained, though it is not clear how far a claim to recover the value of chattels personal or damages for their detention or conversion will lie. Finally, it may be mentioned, that a petition of right is the appropriate remedy for recovering compensation in respect of land taken by the Crown temporarily or permanently for purposes of national defence under the various Defence Acts (*A.-G. v. De Keyser's Royal Hotel* [1920] A. C. 508). But (except in so far as a claim in tort may coincide with one of the claims already noticed as being within the scope of this

remedy) a petition of right does not lie in respect of a tort alleged to have been committed by the Crown or by one of its servants (*Tobin v. The Queen* (1864) 16 C. B. N. S. 310). In such a case the remedy is (except for a tort committed by the King in person, which is without legal redress and rests entirely in his bounty) against the actual tort-feasor, who cannot plead the express or implied authority of his royal master as a defence (*Feather v. The Queen* (1865) 35 L. J. Q. B. 200, where the judgment of Cockburn, C.J., contains, on pp. 208–9, some valuable passages upon torts committed by officers of the Crown).

(iii) *The procedure*.—The proceedings upon a petition of right are now in practice regulated by the Petition of Right Act, 1860. The suppliant (as the claimant in such proceedings is called) is required to leave at the Home Office a petition for the *fiat* of the Crown that right be done; the petition being entitled in the King's Bench or Chancery or Probate, Divorce, and Admiralty Division, according to the nature of the claim. When this *fiat* has been granted, the petition is returned to the suppliant, who will file it at the Central Office, and serve a copy on the Solicitor to the Treasury; and, if the claim is not admitted, a defence is delivered on behalf of the Crown. The subsequent proceedings are very similar to the course of an ordinary action; but the suppliant cannot obtain discovery of documents or of facts against the Crown, which can, however, obtain these remedies against him, and may, as a matter of grace, submit such documents for his inspection as it may choose. Judgment cannot be enforced against the Crown by any mode of execution. Costs are payable both to and by the Crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject.

It has recently been held that an interpleader summons cannot be taken out against the Crown (*The Mogileff* (1922) 38 T. L. R. 71).

(b) *Against Officers of the Crown or Government Departments*.—Where the injury complained of is a breach of a contract, it will usually be found that the Minister or other officer of the Crown with whom the contract was negotiated contracted on behalf of the Crown as a principal, and not so as to make himself personally liable as agent. In such a case, the remedy (if any) is against the Crown itself by means of a petition of right, and not against the Minister or other officer. “An agent of the Crown “is not personally liable on any contract entered into “by him on behalf of the Crown”; and, indeed, even the action against an agent for breach of warranty of his authority (p. 100) does not lie against an agent of the Crown (*Dunn v. Macdonald* [1897] 1 Q. B. 401, 555).

When, on the other hand, the injury for which redress is sought is a tort, the actual tort-feasor is liable, and is not protected by his official position; for, as was said by Cockburn, C.J., in *Feather v. The Queen* (1865) 35 L. J. Q. B., at pp. 208–9, “from the “maxim that the King cannot do wrong, it follows “as a necessary consequence that the King cannot “authorise wrong. For to authorise a wrong to be “done is to do a wrong”; nor does the authority of any master to commit a tort protect the servant from the consequences of the tort at the suit of a third party. As a matter of practice, however, a public servant who commits a wrong in the execution of his duty is frequently defended by the Crown through the solicitor of his department; and judgment against him for damages and costs will be paid by the Crown, as often happens, for instance, in the case of an action for damages for a collision brought

against the navigating officer of one of His Majesty's ships of war.

This principle, namely, that the fact that a tort was committed in pursuance of official orders affords no defence, is sometimes expressed in the statement that an 'act of State' is not a valid defence to an action brought by a British subject, for "between "Her Majesty and one of her subjects there can be "no such thing as an act of State." How far then is the defence available against aliens?

In the case of *Buron v. Denman* (1848) 2 Ex. 167, a British naval officer was sued by a Spaniard for £100,000 damages for trespass and for loss of slaves and other property in respect of acts done in the course of suppressing the slave-trade on the West Coast of Africa; and, his acts having been subsequently ratified by the British Admiralty, he successfully pleaded that he had acted "as the servant of "Queen Victoria and by her command." There the act complained of was committed outside the King's dominions; and the plaintiff was an alien (apparently an alien friend) residing outside the King's dominions. Recently, the scope of the defence has been reviewed by the House of Lords in *Johnstone v. Pedlar* [1921] 1 A. C. 267; and it has been settled that 'act of State' is not a valid defence to an action brought by an alien friend in respect of an act committed within the King's dominions, *e.g.*, in Ireland—at least unless it can be shown that the alien has by treasonable practices forfeited his right to the protection of the courts which comes to him in return for his local allegiance. To sum up, 'act of State' is no defence against a British subject, nor, in respect of acts done within the King's dominions, against an alien friend resident within them by the permission, and under the protection, of the Crown.



## IMMUNITY FOR JUDICIAL ACTS.

There is one class of Crown officer upon whom, by reason of the supreme importance to the country that he should be able to exercise his functions with independence and without fear of consequences, the law has conferred complete immunity from actions brought against him in respect of anything which he may do or say in his judicial capacity, namely, judges of the superior and inferior courts, and other persons exercising judicial functions, such as magistrates or members of a court martial. Provided the act complained of, for instance, an alleged slander or false imprisonment, was committed in the course of a judicial proceeding over which the defendant had proper jurisdiction (and a superior court is deemed to be acting within its jurisdiction unless and until the contrary is proved), no action will lie, (*semble*) even when the defendant has acted in bad faith or with malice or corruptly (*Scott v. Stansfield* (1868) L. R. 3 Ex. 220). No such immunity, however, protects the judicial officer from removal by the Crown in the manner appropriate to his office (see, as to the judges of the superior courts, the provisions of the Act of Settlement, p. 233); and, so important is the faithful administration of the remedies for securing the liberty of the private person, the Habeas Corpus Acts contain provisions rendering liable to heavy damages and penalties any judge, however exalted his position, who unlawfully refuses to grant a writ of *habeas corpus* on application.

A court of justice requires subordinate officers, *e.g.*, sheriffs, bailiffs, constables, &c., for the purpose of carrying out its orders; and it would be unreasonable to expect these persons to examine the validity of every order before they executed it, or to act at their peril. Accordingly they are in large measure

protected from liability to be sued or prosecuted in respect of acts committed by them in the execution of the order of the court. If the order emanates from a superior court, the executive officer who carries it out has complete protection, provided he acts in conformity with it; for instance, a sheriff who is commanded to seize the goods of A., is protected, even though the order should be afterwards proved to be irregular; but he is not protected if he wrongfully seize the goods of B. But, in the case of the orders of an inferior court, the executive officer is usually only protected when the matter is within the jurisdiction of the court; although there are several important statutory exceptions to this rule. Thus (1) a county court bailiff is protected "notwithstanding any defect of jurisdiction or other irregularity in the said warrant" (County Courts Act, 1888, s. 54); and (2) constables and others executing magistrates' warrants are protected against the consequences of defects in the magistrates' jurisdiction (Constables Protection Act, 1750).

Several statutory exceptions to the rule that the Crown cannot be sued have been created, whereby certain Government Departments and Ministers may sue or be sued in respect of their official acts, either generally or in connection with specified matters; for instance, the Board of Education, the Board of Agriculture and Fisheries.

Finally, the Public Authorities Protection Act, 1893, confers an important protection upon such public officers and departments as are liable to be sued by curtailing the normal periods for the limitation of actions to six months, in the case of actions brought against them for any act done in pursuance of any Act of Parliament or public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority. It

also confers certain privileges in the matter of costs and tender of amends.

## II. REMEDIES AVAILABLE TO THE CROWN.

Injuries to the Crown may be redressed by the same means as injuries to a subject ; but the Crown may obtain redress in certain cases by prerogative modes of process which are peculiarly confined to the Crown, but which must nevertheless be exercised, not arbitrarily, but in accordance with recognised principles. For the King was compelled to promise in Magna Charta (ch. xxxix.) : *Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut ullagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*

*Inquisition of Escheat.*—The Clerk of the Crown in Chancery may order a commission of escheat, directing a public inquiry before a jury, on behalf of the Crown, to ascertain whether the Crown is entitled to certain hereditaments through the death of a person intestate and without heirs (Vol. II., Chap. XIV.), and to put the title of the Crown upon record. In order to controvert the possession of the Crown acquired by the finding of such office, the subject may petition for leave to traverse the inquisition ; and thereupon the issue will be tried in the King's Bench Division. Alternatively, under the provisions of the Crown Suits Act, 1865, he is entitled to file a statement of his objection to the finding, and to have the objections inquired into by a fit person, as directed by the court. If the return made in writing to the objection differs in effect from the inquisition, the latter is deemed to be altered so as to conform with the return.

Inquisitions are also resorted to for other purposes ;

for instance, with a view to the ascertainment and forfeiture to the Crown of the property found within the United Kingdom of an alien enemy, in circumstances in which such property is forfeitable (*In re Ferdinand, ex-Tsar of Bulgaria* [1921] 1 Ch. 107).

*Extents*.—Upon all debts of record due to the Crown, the King has his peculiar remedy by writ of *extent in chief*, under which the body, lands, and goods of the debtor may be taken in order to compel the payment of the debt; though it is customary for the sheriff to be instructed not to seize the body of the debtor unless he receives special orders to do so. This proceeding is called an *extent*, from the words of the writ, which direct the sheriff to cause the lands and goods to be appraised at their full value (*extendi facias*), before they are delivered to satisfy the debt. Crown debts of record include debts due to the Crown on inquisition, obligation under seal, or other specialty, and duties detained in the hands of tax collectors.

A writ of extent, for the recovery of the Crown's debt, commissions the sheriff to take an inquisition (or inquest of office), to ascertain the lands, goods, and choses in action of the defendant, and to seize the same into the hands of the Crown. After the issue of the writ, and inquisition taken, and seizure made under it by the sheriff, the defendant, if he means to dispute the debt, or any third person who claims the property set forth in the inquisition, must enter an appearance for that purpose, when he will be permitted to plead to the extent; and, issue thereon having been joined either in law or in fact, the matter is decided according to the ordinary course of practice in actions between subject and subject.

*Immediate extent-in-chief*.—No inquisition or other record, however, is necessary where, on an affidavit of 'debt and danger' (*i.e.*, that immediate steps are necessary to enable the Crown to recover an existing



debt), the Court authorises the issue of a writ of *immediate extent-in-chief* (*R. v. Pridgeon* [1910] 2 K. B. 543; *Pridgeon v. Mellor* (1912) 28 T. L. R. 261).

There is also a writ of extent, which is applicable in the event of the death of a Crown debtor, and is called a *diem clausit extremum*, because it recites the death of the debtor. By this writ, which issues on an affidavit of the debt and death, the sheriff is commanded to take and seize the chattels, debts, and lands of the debtor who has so died, into the hands of the Crown.

There exist also *extents in aid*, by which the Crown can aid its debtor to pay his Crown debt by recovering by this process a debt due to that debtor. But the various kinds of extents are apt to be oppressive, and are falling into desuetude, except that occasional use is made of the *immediate extent-in-chief* above mentioned, in cases of urgency.

*Informations.*—An *information* on behalf of the Crown, exhibited by the Attorney-General, is also a method of obtaining satisfaction in respect of an injury to any of the possessions of the Crown. It is an action to redress a civil injury by which the property of the Crown is affected, differing in this respect from the criminal information which is filed in the King's Bench Division of the High Court, to punish some misdemeanor immediately affecting the Crown, such as cannot be properly left to a prosecution by way of indictment (Vol. IV., pp. 307–312). Informations are said to be *in personam* or *in rem*; and the two informations *in personam* are those of intrusion, and of debt. The information of *intrusion* has for its object the removal of intruders or trespassers and the recovery of damages for any trespass committed on the lands of the Crown (as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the

like) ; and the information of *debt* is for moneys due to the Crown upon the breach of a penal statute. This civil information is also commonly used to recover forfeitures occasioned by breach of the revenue laws.

An information *in rem* lies when a declaration is desired, that certain property in the possession of the Crown belongs to the Crown, or when the Crown claims property which has come into the hands of (*devenerunt*) some person or corporation. For instance, upon the seizure by the officer of the Crown of treasure-trove, wrecks, waifs, and estrays, or goods forfeitable under the Inland Revenue Acts, an information may be filed in the King's Bench Division ; and thereupon a proclamation is made for the owner (if any) to come in and claim the effects, and eventually they may be condemned to the use of the Crown.

An information is a mode of enforcing a claim by the Crown which is not a matter of record ; for in that case a writ of extent or *scire facias* would usually be appropriate. The informations above described are technically known as 'Latin informations,' so called because the pleadings were formerly written in Latin ; but there is another type known as the 'English information,' or information in equity, on the revenue side of the King's Bench Division, which, by reason of its procedure, is sometimes found more suitable for enforcing certain rights of the Crown.

The costs in all civil proceedings by or on behalf of the Crown in matters relating to the public revenue, are now upon the same footing as in actions between subject and subject, so that the costs are usually in the discretion of the Court ; and by the Crown Office Rules, 1906, Order LXV. of the Supreme Court, as to costs, is to apply to all civil proceedings on the Crown side. The proceedings by way of information, and in other matters relating to the revenue, are similar, in many respects, to the procedure in an action.

In conclusion, it may be stated that the whole position of the Crown as a litigant in civil proceedings is at present under consideration by a Committee appointed by the Lord Chancellor. We forbear, therefore, in view of probable changes, to go further into details of the subject.

#### NOTE ON AUTHORITIES.

[For more detailed treatment of the subject of this chapter reference should be made to Anson, "*Law and Custom of the Constitution*," Vol. II., Part II., *The Crown*, pp. 298-304, and Robertson, "*Civil Proceedings by and against the Crown*."] 

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*Printed in England at THE BALLANTYNE PRESS  
SPOTTISWOODE, BALLANTYNE & CO. LTD.  
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